

No. 90-970-CFX  
Status: GRANTED

Title: Lechmere, Inc., Petitioner  
v.  
National Labor Relations Board

Docketed:  
December 17, 1990

Court: United States Court of Appeals  
for the First Circuit

Counsel for petitioner: Joy, Robert P., McCown, Keith H.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1990	G	Petition for writ of certiorari filed.
3	Jan 10 1991		Order extending time to file response to petition until February 15, 1991.
4	Feb 15 1991		Brief amicus curiae of National Retail Federation filed.
5	Feb 15 1991		Brief of respondent NLRB in opposition filed.
7	Feb 15 1991	X	Brief amicus curiae of Council on Labor Law Equality filed.
6	Feb 20 1991		DISTRIBUTED. March 15, 1991
8	Feb 27 1991	X	Reply brief of petitioner Lechmere, Inc. filed.
9	Mar 18 1991		Petition GRANTED. *****
11	Apr 17 1991		Order extending time to file brief of respondent on the merits until May 9, 1991.
12	May 8 1991		Brief amicus curiae of International Council of Shopping Centers, Inc. filed.
13	May 9 1991		Brief amicus curiae of National Retail Federation filed.
14	May 9 1991		Brief amicus curiae of Council on Labor Law Equality filed.
15	May 9 1991		Brief amicus curiae of Food Marketing Institute filed.
16	May 9 1991		Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
18	May 9 1991		Brief of petitioner Lechmere, Inc. filed.
19	May 9 1991		Joint appendix filed.
17	May 10 1991		Lodging received.
21	May 21 1991		Order extending time to file brief of respondent on the merits until June 24, 1991.
22	Jun 24 1991		Brief amici curiae of AFL-CIO, et al. filed.
23	Jun 24 1991		Brief of respondent NLRB filed.
24	Jul 19 1991	G	Application (A91-71) to extend the time to file a reply brief from July 29, 1991 to August 12, 1991, submitted to Justice Souter.
25	Jul 23 1991		Application (A91-71) granted by Justice Souter extending the time to file until August 12, 1991.
26	Jul 30 1991		CIRCULATED.
27	Aug 5 1991		Certified copy of original record and proceedings, 3 vols., received.
28	Aug 12 1991	X	Reply brief of petitioner Lechmere, Inc. filed.
29	Sep 5 1991		SET FOR ARGUMENT TUESDAY, NOVEMBER 12, 1991. (2ND CASE)
30	Nov 12 1991		ARGUED.

90-970

No. -

Supreme Court U.S.  
FILED  
DEC 17 1990  
JOSEPH P. SPANGLER, JR.  
CLERK

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

ROBERT P. JOY, ESQUIRE  
*Counsel of Record*  
KEITH H. McCOWN, ESQUIRE  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666  
*Counsel for Petitioner,  
Lechmere, Inc.*

DECEMBER 17, 1990



**QUESTION FOR REVIEW**

Whether the National Labor Relations Board has impermissibly expanded the right of union representatives to trespass on private property beyond the limits established by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

## TABLE OF CONTENTS

	Page
Opinions Below .....	2
Jurisdiction .....	2
Statutory Provisions Involved .....	2
Statement of the Case .....	3
Reasons for Granting the Writ .....	6
I. By Following <i>Jean Country</i> , the Board and the First Circuit Have Incorrectly Permitted Tres- pass Even Though the Union Had Reasonable Alternatives in its Effort to Reach Lechmere Employees .....	6
II. By Following <i>Jean Country</i> , the Board and the First Circuit Have Betrayed the Court's Expec- tation That a Property Owner's Right to Ex- clude Trespassers is to be the General Rule .....	12
III. As in <i>Babcock &amp; Wilcox</i> , in the Instant Case Deference to the Board is Not Appropriate .....	14
Conclusion .....	15
Appendix A — Decree of the United State Court of Appeals for the First Circuit, September 17, 1990 .....	A-1
Appendix B — Order of the National Labor Relations Board, June 15, 1989 .....	B-1
Appendix C — Order of the United States Court of Appeals for the First Circuit denying Suggestion For Rehearing En Banc by Lechmere, Inc., October 25, 1990 .....	C-1

## TABLE OF AUTHORITIES

Cases:	Page
<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968) . . . . .	7
<i>Babcock and Wilcox Co.</i> , 109 N.L.R.B. 485 (1954), enforcement denied, 222 F.2d 316 (5th Cir. 1955) . . . . .	6, 14
<i>C.E. Wylie Const. Co.</i> , 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989) . . . . .	12
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) . . . . .	7, 9
<i>Dolgin's, A Best Co.</i> , 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989) . . . . .	13
<i>Fairmont Hotel Co.</i> , 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986) . . . . .	3, 10
<i>Granco, Inc.</i> , 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989) . . . . .	13
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) . . . . .	8, 9
<i>Jean Country</i> , 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) . . . . .	4, 9, 10, 12
<i>Lechmere, Inc.</i> , 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989) . . . . .	2, 11
<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313 (1st Cir. 1990) . . . . .	2, 4, 9, 11, 13, 14, 15
<i>Little &amp; Co.</i> , 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) . . . . .	12
<i>Mayer Group, Inc.</i> , 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989) . . . . .	12
<i>Mountain Country Food Store, Inc.</i> , 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989) . . . . .	13
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) . . . . .	3, 5, 6, 7, 9, 10
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 110 S. Ct. 1542 (1990) . . . . .	14
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975) . . . . .	14

	Page
<i>Sahara Tahoe Corp.</i> , 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989) . . . . .	13
<i>Sears, Roebuck &amp; Co. v. San Diego County Council of Carpenters</i> , 436 U.S. 180 (1978) . . . . .	8, 9, 13, 15
<i>Sentry Markets, Inc.</i> , 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), enforced 914 F.2d 113 (7th Cir. 1990) . . . . .	12
<i>Sparks Nugget, Inc.</i> , 298 N.L.R.B. No. 69, 134 L.R.R.M. (BNA) 1121 (1990) . . . . .	12
<i>Subbiondo and Assocs., Inc.</i> , 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA) 1006 (1989) . . . . .	12-13
<i>Target Stores</i> , 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989) . . . . .	13
<i>Trident Seafoods Corp.</i> , 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989) . . . . .	13
<i>W.S. Butterfield Theatres, Inc.</i> , 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989) . . . . .	13

## Statutes:

## National Labor Relations Act, as amended:

Section 7, 29 U.S.C. § 157 . . . . .	2
Section 8(a)(1), 29 U.S.C. § 158(a)(1) . . . . .	2, 3
Section 10(e), 29 U.S.C. § 160(e) . . . . .	2, 4
Section 10(f), 29 U.S.C. § 160(f) . . . . .	4
28 U.S.C. § 1254(1) . . . . .	2

## Constitution:

U.S. Const. amend. I . . . . .	7
--------------------------------	---

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. -

---

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

---

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**PETITION FOR WRIT OF CERTIORARI**

---

Petitioner, Lechmere, Inc. ("Lechmere"),<sup>1</sup> respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit ("First Circuit") to review a judgment enforcing an order of the National Labor Relations Board ("NLRB" or the "Board").

---

<sup>1</sup> In compliance with Rule 29.1, Rules of the Supreme Court of the United States, Lechmere states the following: Lechmere, Inc. is a Massachusetts corporation wholly owned by LMR Acquisition Corp.

## OPINIONS BELOW

The First Circuit's opinion has been reported at 914 F.2d 313 (1st Cir. 1990), and appears at Appendix A to this petition. The underlying decision and order of the NLRB has been reported at 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989), and appears at Appendix B. Included as part of the Board's decision is the earlier opinion and order of the Administrative Law Judge in Case No. 39-CA-3571. Finally, Lechmere filed with the First Circuit a Suggestion For Rehearing En Banc which was denied by an order of the court appearing at Appendix C.

## JURISDICTION

On September 17, 1990, the First Circuit enforced the earlier order of the NLRB. The First Circuit denied Lechmere's Suggestion For Rehearing En Banc on October 25, 1990. Lechmere invokes the jurisdiction of this Court to issue a writ of certiorari under Section 10(e) of the National Labor Relations Act, as amended (the "Act"). 29 U.S.C. § 160(e); see 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 7 of the Act provides in part that "Employees shall have the right to self organization, to form, join, or assist labor organizations . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1).

## STATEMENT OF THE CASE

This case presents the frequently recurring question of whether labor union organizers can trespass on private property to engage in activity otherwise protected by Section 7 of the Act. For at least 30 years the Board has devised differing balancing tests to resolve the contest between "Section 7 rights" and property rights, all purporting to be based upon the only Supreme Court decision that has ever squarely addressed the issue, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). At issue is the Board's most recent approach.

Lechmere is a retail store chain engaged in the sale of goods other than clothing. In the summer of 1987, representatives from Local 919, United Food and Commercial Workers Union, AFL-CIO (the "Union") trespassed on private property both inside and outside Lechmere's store in Newington, Connecticut, and attempted to organize the employees. Lechmere ejected the Union organizers from the store and parking lot, and thereafter consistently excluded them from private property in and around the store.

Lechmere's actions were consistent with a strict, impartially enforced no-solicitation policy. Various groups other than the Union, including the American Automobile Association, the Salvation Army, and the Girl Scouts, had previously been excluded from soliciting on the private property at Lechmere's premises.

The Union filed an unfair labor practice charge alleging that by enforcing its property rights, Lechmere violated Section 8(a)(1) of the Act, which prohibits interference with employees' right to self-organization.

After an evidentiary hearing an Administrative Law Judge ("ALJ") found merit to this charge. He evaluated the issues under *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), which was at that time the Board's latest interpretation of *Babcock & Wilcox*.



Lechmere filed exceptions and the full Board considered the case. The Board affirmed the ALJ but evaluated the case under yet another new approach to *Babcock & Wilcox* issues — *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) — which had substantially modified and partially overruled the not yet two year old *Fairmont Hotel*.

Lechmere petitioned the First Circuit for review of the Board's order, and the Board filed a cross-application for enforcement, all as permitted under Sections 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The First Circuit enforced the Board's order. *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990) (See Appendix A). Judge Torruella strongly dissented.

The crucial factual issue is whether there were reasonable means available to the Union to reach Lechmere's employees, other than trespassing. If so, then Lechmere did not violate the Act by enforcing its property rights.

In the summer of 1987 there were 201 employees at the Lechmere store in Newington; 170 lived in Newington or two contiguous cities, Hartford and New Britain. Before appearing at Lechmere's property, the Union initially chose to use a full page newspaper advertisement in the Hartford Courant with the banner headline "Attention Lechmere Employees", and containing a clip-out union authorization card and the telephone number and address of the Union. That was the first in a series of five similar advertisements that the Union placed in the Hartford Courant and another local newspaper. The Union later ran five more advertisements aimed at persuading the general public not to shop at Lechmere.

The Lechmere store is bounded primarily by a highway and a grassy strip 46 feet wide. The entire grass strip is public property except the four feet closest to the parking lot. Many Lechmere employees are identifiable because they arrive for work one-half hour before morning store hours, and leave up to one-half hour after evening store hours. Employees

generally are required to park in the parking area closest to the public grass strip. The Union stationed its representatives on this grass strip for many days with written materials aimed at organizing Lechmere employees. Later, Union representatives patrolled this perimeter for several months with signs and leaflets aimed at dissuading the public from shopping at Lechmere.

In Connecticut one can obtain the name and address of the registered owner of an automobile by presenting a license plate number at the Division of Motor Vehicles. The Union used this tactic to learn the identity of 41 Lechmere employees. The Union attempted some home visits and telephone calls, and sent various mailings to the employees on this list.

From the foregoing, the Board and the First Circuit concluded that there were no reasonable alternative means for the Union to reach Lechmere's employees, and that the Union's trespass was protected under the Act. The essence of this Petition is that the First Circuit in *Lechmere, Inc.*, by following *Jean Country*, ruled in a manner that is irreconcilable with the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). *Jean Country* strays from *Babcock & Wilcox* by permitting trespass even when there are reasonable alternatives to trespass available. The result of such an accommodation is that the Court's intention that deference be given to private property rights in all but the rarest of circumstances has been slighted. Petitioner asks that the Court order the Board to reformulate the accommodation analysis in a manner that is true to *Babcock & Wilcox*. Upon such reformulation, the factual record in this case will demonstrate that Lechmere did not commit an unfair labor practice under the Act.

## REASONS FOR GRANTING THE WRIT

- I. BY FOLLOWING *Jean Country*, THE BOARD AND THE FIRST CIRCUIT HAVE INCORRECTLY PERMITTED TRESPASS EVEN THOUGH THE UNION HAD REASONABLE ALTERNATIVES IN ITS EFFORT TO REACH LECHMERE EMPLOYEES.

In 1956 the Supreme Court fashioned a balancing test to determine when non-employee union organizers could trespass on private property to engage in protected concerted activities. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (a unanimous decision by eight Justices).

The Court expressly prohibited trespassing by union organizers except in situations where the target employees were inaccessible and "beyond the reach" of less intrusive, non-trespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and telephone calls. *Id.* at 107 n.1, 111-14.

The *Babcock & Wilcox* Court was reviewing a 1954 NLRB decision, which dealt with union organizers' attempts to organize the workforce of a Babcock & Wilcox factory outside a small town. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485 (1954). The factory was adjacent to a highway and surrounded by private property, so the union eventually sent its agents into the parking lot to meet employees face-to-face. Babcock & Wilcox did not permit this trespass and the union filed an unfair labor practice charge.

In its 1954 decision, the Board ruled that it was "impossible or unreasonably difficult" for the union to reach the Babcock & Wilcox workforce at these particular premises by methods less intrusive than trespassing. To remove an "unreasonable impediment" to self-organization, the Board ordered that the union must have access to the factory parking lot and nearby walkways which were on private property. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94. The Court of Appeals denied enforcement of the Board's Order. *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955).

The Supreme Court also rejected the Board's Order. *Babcock & Wilcox*, 351 U.S. at 112. The Court ruled that even reasonable, limited trespassing could not be mandated by the Board "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message," and if the employer "did not discriminate against the union by allowing other distribution." *Id.* The Court concluded that an employer "must allow the union to approach his employees on his property" when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 113.

The Supreme Court has offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where truly necessary — where the "usual channels" of communication do not enable a union to "reach" the target workforce. See *id.* at 112. The Supreme Court cases since *Babcock & Wilcox*, though not squarely on point, have tended to bolster rather than diminish the vitality of the original *Babcock & Wilcox* holding.

In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court held that *Babcock & Wilcox* principles would determine whether a hardware store could lawfully eject non-employee union organizers from its parking lot, rather than the broad First Amendment principles discussed in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley Plaza*, the Court had expanded the very limited principle that First Amendment criteria protected religious solicitation in a "company town", to apply First Amendment rights to peaceful picketing at a privately owned shopping mall. In *Central Hardware*, both the Board and the Court of Appeals applied only *Logan Valley Plaza* to find that union organizers could trespass on a retail store's parking lot. The Supreme Court vacated and instructed that on remand *Babcock & Wilcox*



principles should govern. The Court gave no indication of how *Babcock & Wilcox* would apply to the facts.

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court's opinion was largely devoted to overruling *Logan Valley Plaza*. Again, there had been considerable reliance upon *Logan Valley Plaza* in the proceedings below, and the Court vacated and remanded. The Court, however, did affirm the accommodation principles of *Babcock & Wilcox*. *Hudgens* involved economic strike activity by employees undertaken at the premises of someone other than their employer, which was not the case in *Babcock & Wilcox*. The Court stated that these facts "may or may not be relevant [to the Board] in striking the proper balance" between property rights and Section 7 rights. *Hudgens*, 424 U.S. at 522-23.

Finally, in *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978), the Court upheld a ruling by the California Supreme Court that the Act did not preempt a state court injunction against a union's trespassory "area standards" picketing. To resolve the preemption issue, the Court examined whether the location of the picketing was arguably prohibited under Section 8 or arguably protected under Section 7 of the Act. The Court analyzed the case under *Babcock & Wilcox* in deciding that the picketing was not arguably protected, stating in *dicta*:

[W]hile there are unquestionably examples of trespassory union activity [that might be protected under Section 7], experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.

Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While *Babcock* indicates that an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule. To gain access,

the union has the burden of showing that no other reasonable means of communicating its organizational message to employees exists or that the employer's access rules discriminate against the union solicitation. *The burden . . . is a heavy one . . . [and the balance] has rarely been in favor of trespassory organizational activity.*

*Sears*, 436 U.S. at 205 (emphasis added).

Thus, the Court has remained true to the *Babcock & Wilcox* accommodation that allows trespassing only when the target workforce is inaccessible and cannot be reached by the usual channels of non-trespassory communication. In *Central Hardware* and *Hudgens* the Court repeated the *Babcock & Wilcox* generality that neither property rights nor Section 7 rights are absolute, and that the Board has primary responsibility for accommodating conflicts between the two. *Central Hardware*, 407 U.S. at 544-45; *Hudgens*, 424 U.S. at 522; see *Babcock & Wilcox*, 351 U.S. at 112. The Supreme Court has never hinted, however, that the *Babcock & Wilcox* accommodation was too restrictive of Section 7 rights and ought to be changed. On the contrary, the *dicta* in *Sears* that legitimate trespassory organizational activity will be "rare" is the most natural application of *Babcock & Wilcox*.

Nonetheless, the Board has periodically attempted to expand *Babcock & Wilcox*. See *Lechmere, Inc.*, 914 F.2d at 329-30 (Torruella, J., dissenting), Appendix A at A-31-32. The latest attempt is *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988). As its basis in law for this new *Jean Country* accommodation, the Board relied chiefly upon the following language from *Hudgens* to justify an attempt effectively to circumvent *Babcock & Wilcox*: "The locus of that accommodation [between property rights and Section 7 rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." See *Jean*

*Country*, 291 N.L.R.B. No. 4, slip op. at 4-5, 129 L.R.R.M. (BNA) at 1203 (citing *Hudgens*, 424 U.S. at 522).

After *Jean Country*, the Board now analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the employer's property right; (2) the "strength" of the Section 7 rights exercised by the union<sup>2</sup>; and (3) the availability of reasonable alternative means for the union to achieve its intent. See *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9-10, 129 L.R.R.M. (BNA) at 1205.

*Jean Country* goes astray of *Babcock & Wilcox*. While *Babcock & Wilcox* instructed the Board to determine only whether union organizers can "reach" employees without trespassing, after *Jean Country* the Board now considers "the extent to which exclusive use of non-trespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205 (emphasis added). An analysis that turns on whether the message is diluted is not contemplated by *Babcock & Wilcox*. Rather, the Court was rightfully concerned that the "attempts" to communicate not be ineffective. *Babcock & Wilcox*, 351 U.S. at 112. The distinction between the effectiveness of the "attempts," which is what the *Babcock & Wilcox* Court said, and the effectiveness of the "message," which is what the *Jean Country* Board said, is crucial. The Court was not concerned with "how" the message was received, only "whether" it could have been received. The *Jean Country* approach impermissibly extends the *Babcock & Wilcox* inquiry to include an estimation of the recipient's willingness to listen.

The ALJ in *Lechmere, Inc.* recognized this distinction. He decided the case under *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), and was not required to

<sup>2</sup> Organizational activity, for example, is a strong right, while area standards handbilling is among the weaker Section 7 rights.

evaluate the reasonableness of the available alternative means to communicate with Lechmere's workforce. The ALJ nonetheless concluded in *dicta* that there *were* adequate alternative means by which the Union could reach Lechmere employees. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 10 (ALJ opinion), Appendix B at B-24. ALJ Biblowitz correctly noted that "[t]he fact that a large majority of the employees rejected [the Union's] solicitations does not detract from [the fact that reasonable alternative means were available]; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them." *Id.* at 9-10, Appendix B at B-24.

The Board then decided the case under *Jean Country*, which had been decided in the interim. The Board ignored the ALJ's conclusion that there were reasonable alternative means, relying on facts in the record such as the Union's inability to compile a list of employees, and the failure of employees to return authorization cards. *Id.* at 5, Appendix B at B-5. The Board implicitly rejected the ALJ's definition of effectiveness, and made the Union's success the primary indicator of whether the available non-trespassory means of communication were adequate and effective.

This erroneous approach was largely adopted by the First Circuit. The "badges of [in]effectiveness" cited by the First Circuit included "the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities for face-to-face contact, and the union's failed efforts to reach the employees." *Lechmere, Inc.*, 914 F.2d at 323, Appendix A at A-18-19. These "badges" reflect lack of employee response, not inability to "reach" employees. This goes far beyond *Babcock & Wilcox*.

In the present case, the facts showed that there were at least five methods or "means" by which the Union was able to "reach" Lechmere employees: (1) in person, through con-



versation over the short distance from public property to the area in which employees parked; (2) with signs, handbills, or posters, from the same location; (3) in person at home, by the simple process of tracing license plate registrations; (4) by telephone; and (5) through the large newspaper advertisements voluntarily employed by the Union.

In denying that these collectively were reasonable alternatives to trespass, the Board has lost sight even of its own rule. The Board in *Jean Country* was supposed to look to whether there were reasonably effective "means" of communication, and not whether the communication visited upon employees was effective. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205. When determining whether the means employed were effective, one may properly ask: "Could the employees hear what the union was saying?" or "Could they see their signs or leaflets?" One may not ask: "Did they seem to like what the union had to say?" or "How did they respond?"

## II. BY FOLLOWING *Jean Country*, THE BOARD AND THE FIRST CIRCUIT HAVE BETRAYED THE COURT'S EXPECTATION THAT A PROPERTY OWNER'S RIGHT TO EXCLUDE TRESPASSERS IS TO BE THE GENERAL RULE.

*Jean Country* as applied is also circumventing *Babcock & Wilcox*. In the overwhelming majority of cases in which the Board has conducted a *Jean Country* accommodation analysis to determine whether a property owner has violated Section 8(a)(1) by denying access to union agents, the Board ruled that a violation had occurred.<sup>3</sup>

<sup>3</sup> See, e.g., *Sparks Nugget, Inc.*, 298 N.L.R.B. No. 69, 134 L.R.R.M. (BNA) 1121 (1990); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), enforced 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989); *C.E. Wylie Const. Co.*, 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989); *Subbiondo and Assocs., Inc.*, 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA)

The thrust of *Babcock & Wilcox* unmistakably was to leave intact the usual private property rights, except where unusual circumstances required trespassing. The *Babcock & Wilcox* Court noted that the Act did not endow the NLRB with authority to "impose a servitude on the employer's property." See *Babcock & Wilcox*, 351 U.S. at 108. *Jean Country* fails to give the deference to property rights mandated by the Supreme Court, and substitutes instead a completely relative contest between rights of seemingly equal standing. See *Lechmere, Inc.*, 914 F.2d at 321, Appendix A at A-14 (describing the NLRB's latest attempt at accommodation as "[gathering] three interdependent bundles of facts . . . [tying] them together, and [weighing] them in the aggregate").

When the *Babcock & Wilcox* Court ordered the Board to accommodate these two rights, it did not mean that each right should be given equal weight. The only fair reading of *Babcock & Wilcox* is that the balance must be skewed in favor of private property rights. There can be no doubt after *Sears* that that was the intent. *Sears*, 436 U.S. at 205. By reversing that balance, the Board effectively imposes an easement in favor of union solicitation upon innumerable unsuspecting property owners, even those who (like *Lechmere*) have uniformly forbidden all solicitation. Infringement on private property rights is now the rule.

1006 (1989); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989); *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989).



III. AS IN *Babcock & Wilcox*, IN THE INSTANT CASE DEFERENCE TO THE BOARD IS NOT APPROPRIATE.

Both Chief Justice Rehnquist and Judge Torruella have noted that the Board is entitled to some deference in assessing industrial reality, but when the Board "alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine," it is a judicial function to remedy the imbalance. *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Appendix A at A-24 (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990) (Rehnquist, C.J., concurring)). The decision of the First Circuit is almost a perfect resurrection of the Board's position rejected by the Supreme Court in *Babcock & Wilcox*. See *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Appendix A at A-24-25. The 1954 Board decision of *Babcock and Wilcox Co.* bears a surprising resemblance to the Board's 1989 treatment of *Lechmere, Inc.* Judge Torruella emphasized this similarity in his detailed discussion and chart comparing nine important factors. *Id.* at 327 (Torruella, J., dissenting), Appendix A at A-26. The Board's *deja vu* is troubling because the Supreme Court has spoken in the interim.

The Board is entitled to adapt labor policy to address the "changing patterns of industrial life." See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). What has changed since 1956 to warrant revival of a discredited accommodation of rights? If anything, at present there is a more effective set of communication alternatives for union agents than there were in 1956. See, e.g., *Babcock and Wilcox Co.*, 109 N.L.R.B. at 491 (noting that in 1954 only 60% of the workforce at Babcock & Wilcox even had a telephone). Judge Torruella observed in his dissent that in 1990, politicians and advertisers regularly communicate and successfully persuade people by using methods that the Board has now deemed

ineffective for merely "reaching" people. See *Lechmere, Inc.*, 914 F.2d at 328 (Torruella, J., dissenting), Appendix A at A-28. In addition, if "changing patterns of industrial life" since 1956 have somehow influenced the Board to take its present course, what can be made of the Supreme Court's 1978 dicta that "experience under the Act teaches that [protected instances of trespassory union activity] are rare and that a trespass is far more likely to be unprotected than protected", and an employer's right to bar non-employee union organizers from his property "remains the general rule." *Sears*, 436 U.S. at 205 (emphasis added).

*Jean Country* and *Lechmere, Inc.* are not natural extensions of *Babcock & Wilcox*, nor are they principled departures. *Lechmere* respectfully suggests that this important question merits review by the Supreme Court of the United States.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LECHMERE, INC., *Petitioner*

By its Attorneys,

ROBERT P. JOY, ESQUIRE

*Counsel of Record*

KEITH H. McCOWN, ESQUIRE

MORGAN, BROWN & JOY

One Boston Place

Boston, MA 02108

(617) 523-6666

DECEMBER 17, 1990

A-1

APPENDIX A

United States Court of Appeals  
For the First Circuit

---

No. 89-1683

LECHMERE, INC.  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

---

ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD

---

Before  
TORRUELLA, Circuit Judge,  
BOWNES, Senior Circuit Judge,  
and SELYA, Circuit Judge.

---

*Robert P. Joy, with whom Keith H. McCown and Morgan, Brown & Joy, were on brief for petitioner.*

*Richard A. Cohen, Attorney, with whom Robert E. Allen, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Howard E. Perlstein, Supervisory Attorney, were on brief for respondent.*

---

September 17, 1990

SELYA, *Circuit Judge*. This matter is before us on an employer's petition to review an order of the National Labor Relations Board and a cross application for enforcement. The case raises significant questions concerning the balance which must be struck in the workplace between employers' private property rights and workers' rights of self-organization. We uphold and enforce the order of the Board.

## I. STATEMENT OF THE CASE

### A

The events giving rise to this litigation occurred in Newington, Connecticut. Newington is a suburb of Hartford. The relevant metropolitan area (Greater Hartford) includes at least three cities (Hartford, Newington, New Britain) and close to 900,000 people. The employer, Lechmere, Inc. (Lechmere), is a Massachusetts corporation which operates a chain of retail stores throughout New England. These emporia sell a wide range of "hard goods," including appliances, audio/video equipment, housewares, and sporting paraphernalia. In 1986, Lechmere opened a store in Newington, situated on a roughly rectangular parcel of land approximately 880 feet from north to south and 740 feet from east to west. The tract, commonly called the Lechmere Shopping Plaza, is bounded on the east by a major thoroughfare, the Berlin Turnpike, and on the north by Pascone Street.

Lechmere's store is the dominant structure on the site and stands at the south end of the rectangle. On the west side are 13 smaller shops owned by Newington Commercial Associates Limited Partnership (NewCom), an unrelated entity. Two public pay telephones are located in front of this shopping strip. In June 1987, only four satellite stores were open for business.

The Plaza's parking areas are in servitude to all of the mercantile establishments. There are no signs purporting to

restrict access to, or use of, the parking spaces; no stores have exclusive parking privileges; patrons or employees of any merchant may park anywhere. The primary parking lot (PPL) lies north of Lechmere's store and extends to Pascone Street. The satellite stores face the PPL. A smaller parking lot, more distant from the shopping strip, is situated to the east of Lechmere's store. Ownership of the real estate is divided between Lechmere and NewCom.

A grassy apron approximately 46 feet wide runs the entire length of the property along the Berlin Turnpike. The only breaks in that apron are for ingress to, and egress from, the shopping center. Most of that apron is public property. The remainder of the apron — the four foot strip furthest from the highway — is owned by Lechmere. At the main entrance, the grass continues in a westerly direction for approximately 50 feet on the north side only. Lechmere owns this patch. It also owns the land occupied by, and immediately surrounding, its store. NewCom owns the land occupied by, and immediately surrounding, the shopping strip. The remainder of the parcel, including most of the parking area, is owned jointly by Lechmere and NewCom.

There are three entrances to the property. The principal ingress is from the Berlin Turnpike, providing easy access to Lechmere's establishment and the strip stores. At this entrance, a directory-type sign identifies two of the stores in the shopping center as "Lechmere" and "Card Gallery." A second ingress route runs off Pascone Street, north of Lechmere's store and east of the shopping strip. This entrance faces the front of Lechmere's store and, like the main entrance, feeds into the PPL. Finally, there is a delivery entrance at the southernmost end of the property, running from the Berlin Turnpike to a loading dock behind Lechmere's building.

The public can enter the Lechmere store at one of two points. The principal doorway, facing north, is directly accessible from the PPL. The secondary door, on the store's east side, fronts a vehicular pick-up area. Lechmere employees



who drive to work are instructed to use this entrance. They are also asked to park in the easternmost portion of the PPL, that is, in the spaces closest to the Berlin Turnpike. On each set of doors to Lechmere's premises are 6" x 8" signs stating: "TO THE PUBLIC. No Solicitation, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises."

Lechmere's no-solicitation policy is reduced to writing and has been in effect since 1982. It states:

Solicitation of associates [*i.e.*, employees] in the work areas during working time is strictly prohibited. It is strictly prohibited in all selling and public areas at all times. Non-working time includes break periods, meal periods and other specified periods during the work day when associates are properly not engaged in performing their work tasks. Distribution of literature in work areas and public selling areas is prohibited.

Non-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

Historically, the no-solicitation policy has applied to the store and the parking lots. It has been strictly enforced. Various groups, including the American Automobile Association, the Salvation Army, and the Girl Scouts, have from time to time been prevented from soliciting on the premises.

## B

In mid-1987, Lechmere had roughly 200 employees in Newington, all non-union. Beginning on June 16 of that year, Local 919 of the United Food and Commercial Workers (the

union) placed a series of five advertisements in the Hartford Courant, a daily newspaper, in an attempt to organize Lechmere's work force. The advertisements each contained a replica of a union authorization card captioned "mail today" or "mail it now." On one occasion, the ad consisted of a flyer distributed in conjunction with the newspaper. Given the Courant's limited penetration of the populous suburban area — it was delivered to fewer than 100,000 subscribers daily — and the fact that Lechmere systematically removed the ads from newspapers delivered to its Newington store, there is no particular reason to believe that many of the affected employees actually saw the ads.

On June 18, nonemployee union organizers started leafleting cars in the PPL, concentrating on the east side, thinking that a high percentage of these vehicles belonged to employees. Petitioner's assistant manager asked the organizers to leave and petitioner's security guards removed the pamphlets. A brochure which had been handed to an employee was confiscated by a guard. On two other occasions, handbilling sorties were aborted in a similar manner.

On the morning of June 20, union organizers, not part of Lechmere's work force, stood on the grassy apron, within a few feet of the Berlin Turnpike, in effect bracketing the main entrance. They attempted to distribute handbills to cars entering the PPL, assuming that, because of the early hour, the intended recipients were employees. A cadre of Lechmere officials responded; the general manager, various supervisors, and three security guards emerged from the store and confronted the union representatives. The manager told the organizers that they were on Lechmere's property and insisted that they leave. He threatened to call the police if they did not comply. Contending that they were on public land, the organizers refused to depart. Petitioner made good its threat.<sup>1</sup>

<sup>1</sup> The testimony of Lechmere's manager as to when he called the police contained inherent contradictions. As a result, the administrative law judge chose to credit the testimony of the union representatives over that of the manager. There is no valid basis for us to disturb reasonable credibility

On arrival, the police officers questioned the organizers, confirmed that they were on public property, and allowed them to continue their activities. At the same time, the police observed that the organizers were dangerously close to the highway and warned them against obstructing traffic flow. Because Lechmere's security guards were videotaping their movements, the union representatives departed.<sup>2</sup>

From August 7 through September 5, the union picketed Lechmere, regularly stationing personnel on the public portion of the grassy apron. During the next six months, intermittent picketing took place. The union also scanned the license plates of cars parked in the general area where employees had been told to park, and checked the information obtained with the Connecticut Department of Motor Vehicles. Notwithstanding these efforts, the union was only able to secure the names and addresses of 41 nonsupervisory Lechmere employees. Making what use it could of this information — nearly half of the 41 persons proved to have unlisted telephone numbers — the union tried to call or visit a good many of these workers. Several were high school students whose parents barred union organizers from talking to them. Four mailings to the contingent produced only one signed authorization card.

## C

The union filed unfair labor practice (ULP) charges on July 21, 1987. After an evidentiary hearing before an administra-

judgments of this kind. See, e.g., *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 27 (1st Cir. 1985) (discussing court's obligation to defer to the Board's credibility determinations); *Rikal, Inc. v. NLRB*, 721 F.2d 402, 406 (1st Cir. 1983) (similar).

<sup>2</sup> Although it was alleged that videotaping constituted illegal surveillance in violation of 29 U.S.C. § 158(a)(1), the Board dismissed this charge. No appeal has been taken from that aspect of the Board's decision and we do not address it here. Matters raised before the agency, but not briefed on appeal, are waived. See, e.g., *Consumers Union v. FPC*, 510 F.2d 656, 662 & nn.9, 10 (D.C. Cir. 1974); see also *Marin Piazza v. Aponte Rogue*, 909 F.2d 35, — (1st Cir. 1990) (discussing preclusive effect of Fed. R. App. P. 28(a) in analogous circumstances).

tive law judge (ALJ), it was concluded that Lechmere violated Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1), in two ways: (1) by refusing to allow representatives of Local 919 to engage in organizational activity on company property, and (2) by attempting to remove union representatives from a public area adjacent to company property. Following the Board's issuance of a suitable remedial order (the terms of which are not challenged), the present proceeding materialized.<sup>3</sup>

## II. THE BOARD'S ROLE

It is undisputed that "the N.L.R.B. has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990). Given the Board's "special competence" in the field of labor relations, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), and its vital role in administering the Act, we accord considerable deference to its views. See *Curtin Matheson*, 110 S. Ct. at 1549. This deference extends to the Board's factual determinations, so long as they are supported by substantial evidence on the record as a whole. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 25 (1st Cir. 1985); see also 29 U.S.C. § 160e).

The Board's application of law to fact is reviewed under substantially the same standard. See *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). Thus, the Board's resolution of a mixed question of fact and law is worthy of deference and must be honored so long as the resolution is factually reasonable, that is, founded upon substantial evidence, and legally sound. See *NLRB v. Hearst Publications*, 322 U.S. 111,

<sup>3</sup> The Board adopted the ALJ's factual findings, including credibility determinations. Accordingly, we henceforth refer to the ALJ's findings as the Board's. See *Local Union No. 25, Teamsters v. NLRB*, 831 F.2d 1149, 1151 n.1 (1st Cir. 1987); *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 24 n.1 (1st Cir. 1985). In our view, the ALJ's factual findings are fully consonant with 29 U.S.C. §§ 160(e), (f).



130-31 (1944); *Boston Univ. Chapter, AAUP v. NLRB*, 835 F.2d 399, 401 (1st Cir. 1987). As to inferential and deductive constructs which the Board employs to assist it in answering mixed fact/law questions, courts should uphold the Board's approach as long as it is rational and consistent with the Act. See *Curtin Matheson*, 110 S. Ct. at 1549; *Destileria Serrales, Inc. v. NLRB*, 882 F.2d 19, 21-22 (1st Cir. 1989); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22-23 (1st Cir.), cert. denied, 464 U.S. 892 (1983). Because it is the Board which, over time, must adapt the Act to the changes that suffuse industrial life, the Board's chosen decisional model is entitled to judicial respect even if it represents a departure from prior policy. *Curtin Matheson*, 110 S. Ct. at 1549. Put another way: "To hold that the Board's earlier decisions froze the development of [an] important aspect of the national labor law would misconceive the nature of administrative decision making." *J. Weingarten*, 420 U.S. at 265-66.

While the standard of review is unarguably deferential — so long as the Board's conclusion derives plausibly from the record, we may not reverse it simply because we, unencumbered, would have reached a different result — deference does not imply that courts should rubber-stamp the Board's decisions. See *id.* at 266. Matters of law are, of course, subject to plenary review. See, e.g., *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963). Furthermore, a reviewing court is obliged to set aside the Board's findings of fact, notwithstanding the deference due, when the evidence, "tak[ing] into account whatever in the record fairly detracts" from the proof on which the Board relies, it is not adequate to sustain the conclusion drawn. *Universal Camera*, 340 U.S. at 488. Evidence which is vague or entropic cannot be palmed off as "substantial" under the guise of respect for the agency's determinations. The key is the reasonableness of the Board's findings, judged in light of the entire record. See, e.g., *Penntech*, 706 F.2d at 23; *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1073 (1st Cir. 1981).

### III. THE FIRST UNFAIR LABOR PRACTICE

#### A

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to self-organization.<sup>4</sup> Section 8(a)(1), 29 U.S.C. § 158(a)(1), prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of [Section 7] rights." Experience teaches that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Such "others" are, typically, unions and union organizers. Although the Section 7 right is the workers' right, not the union's right, unions and their agents, derivatively, enjoy the protection of Section 7. See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972); *Emery Realty, Inc. v. NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988); see also *Thomas v. Collins*, 323 U.S. 516, 533-34 (1945) (addressing the "necessarily correlative . . . right of the union, its members and officials . . . to discuss with and inform . . . employees concerning" choices anent unionization).

The prerogatives conferred by Section 7 are important, but not absolute. If an effort to further Section 7 rights conflicts with other, equally solemn rights, the law demands a reasonable accommodation. One situation which frequently sets competing rights on a collision course occurs when a union's game plan for mounting an organizational campaign involves trespass, thus encroaching on an employers' property rights. In such straitened circumstances, the adjudicatory task

<sup>4</sup> Section 7 provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. § 157.

is to strike an equitable balance "between employees' § 7 rights and employer's property rights ... 'with as little destruction of one as is consistent with the maintenance of the other'." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *Babcock*, 351 U.S. at 112). The task is often more easily stated than achieved.

## B

The seminal case in this murky corner of the law is *Babcock*. There, a manufacturing concern owned and operated a fenced 500-employee plant on a 100-acre tract in a predominantly rural area near a community of approximately 21,000 people. About 40% of the employees dwelt in the nearby town, while the rest lived within a 30-mile radius. The plant's parking lot could be reached only by a 100-yard-long driveway, entirely on the employer's property. A 31-foot public right-of-way extended from the highway and intersected the driveway at one point. This junction was the only public place in the immediate vicinity of the plant at which leaflets could be distributed to employees, but safety considerations made any such distribution "practically impossible." 351 U.S. at 107. The union used the mails to communicate with over 100 employees, visited some homes, and talked to some employees by telephone. Dissatisfied with the results, union organizers, none of whom were employees, tried handbilling in the parking lot. The company had, and enforced, a comprehensive no-solicitation policy prohibiting such activity by nonemployees on company grounds. Applying this policy, it banned the organizers.

The Board ruled that Section 8(a)(1) had been infringed. The court of appeals disagreed, 222 F.2d 316 (5th Cir. 1955), as did the High Court. Justice Reed wrote that nonemployee union organizers did not enjoy the same status as employees of their invitees and could be excluded from the employer's private property if "reasonable efforts by the union through

other available channels of communication w[ould have] enable[d] it to reach" the work force with its message. 351 U.S. at 112. Since several alternative means of employee contact were available — alternatives which would likely be effective since a large proportion of the employees were easily accessible outside of working hours, *id.* at 113 — the employer's right to exclude nonemployees from its property need not yield to permit the dissemination of organizational information by trespassory means. *Id.* at 112-13. Put another way, the company could deny nonemployees the right to distribute union literature in the plant parking lot because the employees, though deprived of the benefits of handbilling, were not "beyond the reach of reasonable union efforts to communicate with them". *Id.* at 113.

In *Hudgens*, the Court reaffirmed that the extent of the necessary accommodation rested largely "on the nature and strength of the respective § 7 rights and private property rights asserted in any given context"; and that allowing trespassory access to private property, or not, depends upon a reasoned assessment and weighing of the interests involved and the availability of alternative means of communication. 424 U.S. at 522.

In *Sears*, the Court held that a state court could entertain an employer's state-law trespass claims against union representatives engaged in area standards picketing. 436 U.S. at 207-08. In discussing whether the state-law claims were preempted, the Court explained that, unlike organizational picketing, "[a]rea-standards picketing ... has no ... vital link to the employees located on the employer's property." *Id.* at 206 n.42. Thus, "[E]ven ... [if] ... picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances." *Id.* at 206 (footnote omitted). *Sears*, then, highlighted the strength of the Section 7 right as a critical factor in the equation. While the right



asserted in *Sears*, itself — area standards picketing at a remote locus — was relatively weak, the *Sears* Court was careful to note, in dicta, that the right to organize without employer interference is a heartier Section 7 right, lying at “the very core” of the Act. *Id.* at 206 n.42.<sup>5</sup>

## C

Over the years, the Board has made several efforts to formulate a workable standard around the dictates of *Babcock* and its progeny. Its most recent attempt is contained in *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988). Petitioner argues that the balancing test articulated in *Jean Country*, applied here by the Board to petitioner’s detriment, does violence both to *Babcock* and to the Act. In addressing Lechmere’s argument, we must determine whether the Board’s elaboration in *Jean Country* constitutes a reasonable construction of the Act in light of the “changing patterns of industrial life,” *J. Weingarten*, 420 U.S. at 266; and if so, whether the Board’s calibration of competing rights in this case passes the substantial evidence test.

In *Jean Country*, the Board abserved initially that “there is a ‘spectrum’ of Section 7 rights and private property rights and . . . the place of a particular right in that spectrum might affect the outcome of a [given] case.” *Jean Country*, *supra*, at 8. That is familiar lore. See *Hudgens*, 424 U.S. at 522; *Babcock*,

<sup>5</sup> To be sure, the Court also noted, again in dicta, that union assertions of the right to trespass for organizational purposes have “generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees.” *Sears*, 436 U.S. at 205-06 n.41. Lechmere interprets this statement to mean that a heavy presumption exists in favor of property rights over Section 7 rights. We do not agree. Rather, we believe the Court meant merely to reinforce the idea that the burden of proving a lack of reasonable alternative means of communication rests with the trespasser. Absent a showing, based upon objective criteria, that such means are futile or likely not to exist, a union’s assertion of access rights will probably be denied.

351 U.S. at 112. The Board indicated that, in developing shadings along the spectrum, it will typically not be enough merely to collect information defining the nature and strength of the competing rights in a particular situation. A third bundle of information will also be needed, pertaining to the “availability of reasonably effective alternative means” of communication. *Jean Country*, *supra*, at 9. The Board characterized its “essential concern” as “the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted,” factoring in “the availability of reasonably effective means.” *Id.*

The Board forecast that, “in cases when a property owner has especially compelling reasons for barring access and when the Section 7 right is less central than, for example, the right of employees to organize . . . we may more readily find that means of communication other than those entailing entry onto the property in question constitute a reasonable alternative.” *Id.* at 8. Conversely, if a particular property right is diluted, as “when property is open to the general public” and some “more private character has [not] been maintained,” it becomes more likely that other alternatives will be found unsatisfactory and a denial of access found unlawful. *Id.* at 10. The Board wisely disclaimed any mechanical formula, *id.* at 9-10, offering instead a compendium of factors which might prove relevant in assessing the contents of the various informational bundles.<sup>6</sup>

<sup>6</sup> These included: (1) as to the employer’s property right, the nature of the interest, the use to which the property is put, any restrictions that are imposed on public access to it, and the property’s relative size and openness, *Jean Country*, *supra*, at 8; (2) as to the employees’ Section 7 right, the nature of the right, the identity of the employer to whom the right is directly related, the relationship of the employer to the property, the identity of the audience to which the communication concerning the Section 7 right is directed, and the manner in which the activity related to that right is carried out, *id.*; and (3) as to alternative means, the safety of attempting communications at alternative sites or in other ways, the desirability of avoiding enmeshment of neutrals, and the extent to which use of communication alternatives, to the exclusion of trespassory conduct, would dilute the effectiveness of the union’s message, *id.* at 8-9.

This elaboration constitutes a plain recognition by the Board that it must gather the three interdependent bundles of facts just described — strength of employees' Section 7 right, strength of employer's property right, availability and efficacy of alternative means of communication — tie them together, and weigh them in the aggregate. We find this approach to the accommodation of competing interests with *Babcock* and in tune with the Act. In our judgment, *Jean Country* states a permissible view of the law and affords a useful analytic model for resolution of access-to-property cases. We are reinforced in our assessment by the District of Columbia Circuit's recent holding that "[t]he elaboration . . . advanced in *Jean Country* . . . sensibly construes the Act in light of High Court precedent in point." *Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990); see also *Emery Realty*, 863 F.2d at 1264 (citing *Jean Country* with approval). Since *Jean Country* is a "reasonable interpretation of the Act," *NLRB v. City Disposal Systems*, 465 U.S. 822, 841 (1984), melding harmoniously with binding precedent, we accept the Board's reliance on it.<sup>7</sup>

## D

Lechmere contends that, even if *Jean Country* comprises a reliable explication of the law, the Board incorrectly applied it in this case. As a corollary matter, Lechmere also contends that the Board's findings fail the substantial evidence test.

We look to the record and to the Board's analysis. It is beyond serious question that the Section 7 interest of the company's employees in receiving organizational information from

<sup>7</sup> The dissent argues that *Jean Country* is entitled to less than the usual deference because it represents a change in policy. As we have previously recognized, however, an agency is not shackled by its prior precedents if it explicitly acknowledges that it is departing and offers a principled rationale for its departure. See *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989). In the present case, we think the Board has adequately fulfilled our criteria.

the union was robust, implicating what the *Sears* Court, 436 U.S. at 206 n.42, called a "core" Section 7 right. Lechmere's property right was not quite as strong. On the one hand, petitioner was a co-owner of the parking lot, used it for business purposes, and followed a stringent no-solicitation policy. On the other hand, petitioner's property interest was diluted by the public nature of the parking lot and the nonexclusivity of its use. Moreover, the Board found, and the record abundantly supports, that the planned organizational activity did not interfere with normal use of the PPL, disrupt Lechmere's business, constitute harassment, or impede traffic flow.<sup>8</sup> All in all, we cannot fault the Board's determination that the property right here at issue, though "relatively substantial," did not serve to "diminish the strength of the core Section 7 right asserted."

The Board also found that, unless effective alternative means of communicating the organizational message existed, the Union's Section 7 right would be so "severely impaired" as to be "substantially destroyed." Such a premise is consistent with the Court's statement that "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock*, 351 U.S. at 112. Thus, when the Section 7 interest is powerful, the *Babcock* accommodation anchors the necessity of trespass rather firmly to

<sup>8</sup> We have reviewed the employer's proffer of evidence that union representatives occasionally entered the store itself. We believe that the Board, in its discretion, reasonably rejected the proffer on relevancy grounds. The only issue presented in this case was whether the company lawfully denied the union access to the parking areas for handbilling purposes. The Board's order does not in any way foreclose petitioner from continuing to bar distribution of leaflets by nonemployees within the store proper.



the unavailability of other reasonably efficacious means of communicating with the desired audience.<sup>9</sup>

This brings us to the crux of the dispute: whether the union had open to it other effective means of reaching Lechmere's work force with its organizational message. The devoir of persuasion rested with the union. See *Sears*, 436 U.S. at 205; *Jean Country*, *supra*, at 7. The Board determined that the burden had been met: "there [were] no reasonable, effective alternative means available for the Union to communicate its message to the [company's] employees." Petitioner's current assault requires that we probe the multifaceted calculus of alternative means in order to explain why we do not regard this determination as undeserving of deference.

Of course, there is no surefire litmus test which can reveal, unfailingly, whether available communicative means are reasonably effective alternatives to trespassory handbilling in a given situation. Be that as it may, the lowest common denominator of the alternative means calculus necessarily reduces to objective reasonableness. See *Jean Country*, *supra*, at 7 (showing of ineffectiveness must be "based on objective considerations, rather than subjective impressions"). Reasonableness expands and contracts: the rights at issue, and the particular circumstances, color its definition whenever alternative means are examined. After all, the Court made clear in *Hudgens* that both Section 7 rights and property rights exist along a continuum. 424 U.S. at 522. The strength and nature of these rights will "inform the analysis of whether a union has reasonable alternative means to reach the targets of its section 7 activity." *Laborers' Local*, 904 F.2d at 718. Thus, the expansiveness of "reasonable alternative means" will vary inversely with the strength and nature of the Section 7 right asserted

<sup>9</sup> The anchor may be dropped differently in cases where the employer's access rules single out, and discriminate against, union activity. See, e.g., *Sears*, 436 U.S. at 205. Here, however, we are not dealing with discriminatory access rules. Lechmere's no-solicitation policy was enforced impartially.

and will vary directly with the strength and nature of the private property right asserted. Because reasonableness is a concept, not a constant, cf. *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987) (reasonableness is a "mutable cloud, which is always and never the same") (paraphrasing Emerson), determinations of reasonableness are, in this environment, *sui generis*.

These principles are especially important in distinguishing *Babcock* from the case at hand. Although the strength of the Section 7 right in the two cases seems equal — indeed, the right at issue is substantially identical — the property right asserted in *Babcock* was significantly stronger than that asserted here. In *Babcock* itself, the factory was the only building on a large, secluded tract; as a manufacturing facility, it was not open to the public or any other regular influx of invitees; the surrounding area was rural; the employees, while inaccessible at work, were relatively accessible to union organizers off hours, since virtually all the employees lived within 30 miles of the plant and there was only one community of any size in the vicinity; and more than 90% of the employees drove to work in private automobiles and parked in a private company lot, using a driveway which only served the employer's premises. Significantly, there was no allegation that the union did not know, or would have difficulty absent trespassory solicitation in ascertaining, the workers' identities. These circumstances required a finding that the employees were "in reasonable reach" by methods short of trespassory handbilling. *Babcock*, 351 U.S. at 113. In a small-town setting, readily identifiable workers were open to other reasonable alternatives such as "us[ing] personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111.

The situation at bar presents some meaningful differences. Unlike in *Babcock*, the Board found that Lechmere's employees are not easily accessible or identifiable. Unlike in *Babcock*, Lechmere's work force is drawn from a much more



populous area and reports to work at a place where it is difficult to discern the targeted audience from the multitude of shoppers and persons working for other businesses within the Plaza.

The Board's other findings also tend to distinguish the instant case from *Babcock*. Here, the union had made a good-faith effort to explore alternative routes.<sup>10</sup> Although it expended considerable time and effort, the union was able to compile merely a skeletal employee roster. It had tried, and abandoned, deploying handbillers on public property — a practice which the Board found unsafe and ineffectual.<sup>11</sup> No other plausible method of personal contact with the majority of the work force had been suggested. The mail — a method which, by itself, has been said not to constitute an effective alternative to personal contact, *see, e.g., National Maritime Union v. NLRB*, 867 F.2d 767, 773 (2d Cir. 1989); *NLRB v. Tamiment, Inc.*, 451 F.2d 794, 798 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972) — was impracticable in this case because of the incomplete list of names and addresses. The union had tried newspaper advertising, without notable success, and the Board judged such advertising to be inutile.

The badges of effectiveness must be applied in a practical, common-sense way. Here, the location of the store as part of a shopping mall, the employer's unwillingness to disclose the names and addresses of workers, the workers' scattered domiciles throughout a populous metropolitan area, the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities

<sup>10</sup> We reject petitioner's intimation that the union must actually exhaust every conceivable means, proving it to be in fact ineffective. A good-faith effort is all that should be required. *See Emery Realty*, 863 F.2d at 1265; *Husky Oil, N.P.R. Operations, Inc. v. NLRB*, 669 F.2d 643, 645 (10th Cir. 1982).

<sup>11</sup> The only available strip of public property, the edge of the grassy apron, abuts the Berlin Turnpike, a four-lane highway with a speed limit of 50 m.p.h. The area is commercial in character and there are indications in the record that traffic is more than minimal. There is no traffic signal or stop sign at the entrance from the turnpike into the Plaza.

for face-to-face contact, and the union's failed efforts to reach the employees, all argue convincingly in favor of the Board's determination. Moreover, we think that in this instance three factors weigh heavily in the balance: (1) the lack of other feasible ways of reaching workers in person, (2) the prohibitive cost of certain other suggested alternatives, and (3) the minimally intrusive nature of the putative trespass. We comment briefly on each of these aspects.

First, we recognize that personal contact is an important part of any organizing effort. Whether to opt for a union, or not, is rarely a cut-and-dried proposition; there are pros and cons, the evaluation of which may be better suited to the dynamics of lively discourse than to the static impersonality of more remote approaches. Non-unionized workers are often fearful of management's reactions to the proposed introduction of a union, and personal contact is extremely useful in overcoming such timorousness. Here, the union had no other feasible way of effecting personal contact with the majority of the workers. We do not suggest that trespassory handbilling must be allowed whenever personal contact is otherwise unavailable — but we believe, nevertheless, that the absence of other opportunities for personal contact will, in the usual case, cut sharply in favor of the union. Put another way, the easier the union's access to the workers, the more that non-trespassory means of communication will suffice.<sup>12</sup>

<sup>12</sup> Accessibility, in this context, is dichotomous. One aspect implicates the geography of the workplace. *Cf., e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799 (1945) (recognizing need for access to remote "mining or lumber camp where the employees pass their rest as well as their work time"); *Husky Oil, N.P.R. Operations, Inc. v. NLRB*, 669 F.2d 643, 646-47 (10th Cir. 1982) (cataloging cases). The second aspect of accessibility implicates the identifiability of the work force: if the union does not know, and cannot readily learn, the names and addresses of the employees, alternative means will in many cases shrink dramatically in effectiveness. *Cf., e.g., NLRB v. Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d at 753, 754 (8th Cir. 1973) (denying trespassory entry where, *inter alia*, the employer "supplied the union with the names and addresses of crew members and the dates and places on which each would board or leave the boats");

Second, we think it is unrealistic to divorce considerations of cost from the calculus of alternative means. In theory, a union could always buy enough television time to saturate a market and thus convey its organizational message to the affected employees. Yet in the ordinary case, it would be wildly unreasonable to expect the union to embrace this extreme. Television advertising is expensive and, when addressed to a work force which comprises a tiny fraction of the viewing audience, extravagantly wasteful. Much the same can be said for many radio and newspaper advertisements. *See, e.g., NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967) (radio and newspaper advertising alone are not reasonable alternatives because they are expensive and relatively ineffectual). To be genuine alternatives, communicative means must be cost-effective to some degree.<sup>13</sup>

Petitioner makes much of the Court's observation that, in *Babcock*, "[t]he various instruments of publicity" were available to the union. *Babcock*, 351 U.S. at 113. We do not read this single statement as meaning that the existence — whatever the cost — of mass media outlets necessarily trumps the employees' Section 7 right of self-organization. *Accord National Maritime Union v. NLRB*, 867 F.2d 767, 773 (2d Cir. 1989) (pointing out that "the Court did not state that these methods, without more, provided an adequate means of communication"). In a case like *Babcock*, where the work force was clustered in and around a small town, it may well be that "instruments of publicity," say, posters at the grange hall

*NLRB v. Solo Cup Co.*, 422 F.2d 1149, 1151 (7th Cir. 1970) (denying trespassory entry because, *inter alia*, the work force was "readily identifiable").

<sup>13</sup> In *Jean Country*, the Board "note[d] . . . generally, [that] it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." *Jean Country, supra*, at 7. The dissent says that the Board thus wove an impermissible "rule" out of "balance-tipping dogma." We think this criticism misreads the quoted statement — a statement which we see as no more than a prediction of probable outcomes in an increasingly urbanized society where use of the mass media has become more and more expensive.

or an inexpensive ad in a weekly newspaper, comprise reasonable alternatives. That is much less likely to be true, however, when the work force is scattered throughout a metropolitan area like Greater Hartford.

The third special factor in this case does not directly implicate the alternative means calculus, but bears upon it in practical terms. We agree with other courts that in a trespassory solicitation case the extent of the union's intrusion affects whether the property right should prevail. *See, e.g., Laborers' Local*, 904 F.2d at 718 (property interest not compelling where handbilling carried out unobtrusively in parking lots which were, generally, treated as public property); *Emery Realty*, 863 F.2d at 1264 (property interest in arcade portion of shopping mall weakened by being open to public for shopping and as a route for pedestrian travel). Permitting non-disruptive or minimally disruptive trespass constitutes a much gentler accommodation than insisting that a property right yield to organizational activity which threatens the normal operations of the owner's business. *See, e.g., NLRB v. Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d 753, 756 (8th Cir. 1973) (denying trespassory access where work force otherwise identifiable and access to property would substantially interfere with production). In other words, trespassory handbilling in such a situation balances the competing rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock*, 351 U.S. at 112.

In sum, we believe that the Board's findings, its conclusion that no other reasonably effective means of communication were open to the union, and its endorsement of Local 919's handbilling, were supportable. To be sure, the question is close — but its very closeness argues in favor of staying the judicial hand. The Court, after all, has no doubt of the Board's pivotal role in performing the necessary assessment, observing that "the locus of [the] accommodation . . . may fall at differing points along the spectrum . . . [and] the primary respon-



sibility for making this accommodation must rest with the Board in the first instance." *Hudgens*, 424 U.S. at 522. In this case, the Board had a rational basis to conclude that, absent trespassory handbilling, the employees were "beyond the reach of reasonable union efforts to communicate with them." *Babcock*, 351 U.S. at 113. Its analysis is sufficiently record-rooted to withstand appellate scrutiny under the deferential standard which we must apply. Accordingly, the holding that Lechmere violated Section 8(a)(1) by barring union representatives from organizational activity in the shopping center's parking lot is free from legal infirmity.

#### IV. THE SECOND UNFAIR LABOR PRACTICE

The second ULP focuses upon the union's attempt to use public property — the portion of the grass apron nearest the highway — as a base for distributing leaflets to motorists entering the PPL. The overarching legal principle is staunch: an employer cannot interfere with protected union activities that occur away from its premises. *See, e.g., NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1323 (5th Cir. 1970); *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 894 (6th Cir. 1965); *cf. Hughes Properties, Inc. v. NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985) (discussing solicitation in cafeteria on employer's property during non-working hours). In general, therefore, an employer violates Section 8(a)(1) by trying to silence nonemployee union organizers in their efforts to communicate with employees from public property adjacent to the workplace.

Here, the Board found, supportably, that the store manager told "the [u]nion representative[s] to leave [while] they were on public property, where they had a right to be." The manager conceded as much on cross-examination. The evidence showed that, after summoning the police, the manager insisted, wrongly, that the union organizers were

trespassing. In these circumstances, and mindful of the Board's latitude in judging credibility, *see supra* note 1, the record amply supports the conclusion that Lechmere endeavored to have the police oust union representatives from the public portion of the grassy apron on the date in question, thus violating Section 8(a)(1).

In addition to challenging the Board's finding on this point, the company also attempts to confess and avoid. It argues that, even if the June 20 incident occurred as stated, it was too isolated and inconsequential to bear the weight of a ULP charge. We do not agree. Although the Board, and the federal appellate courts, have recognized that a *de minimis* principle may have some small place in unfair labor practice proceedings, *see, e.g., NLRB v. Grunwald-Marx, Inc.*, 290 F.2d 210, 210 (9th Cir. 1961) (*per curiam*), we think such a doctrine is inapposite here. Any course of conduct, no matter how enduring or persuasive, can be broken down into tiny particles and made to seem relatively benign. But, events must be judged in context. So viewed, what transpired on June 20 cannot fairly be characterized as a single, isolated, innocuous instance of anti-union animus. Rather, it was part of an ongoing struggle between union and management, each jockeying for position as Local 919 sought to organize Lechmere's employees. As such, the Board was well within its domain in concluding that the employer's conduct, seen in the light of the record as a whole, was not within the narrow *de minimis* exception.

#### V. CONCLUSION

We need go no further. For the reasons mentioned, we are persuaded that the Board's findings rest upon substantial evidence and are untainted by any cognizable error of law. Lechmere's petition for review is denied and dismissed, the NLRB's cross application is granted, and its order is

*Enforced.*

TORRUELLA, *Circuit Judge* (Dissenting). Paraphrasing Chief Judge Rehnquist's concurring opinion in *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990), "[t]he Board's . . . rule [in this case] seems to me to press [past] the limit the deference to which the Board is entitled in assessing industrial reality . . . ." This is an important case because it alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine. The issue presented here is not a new one although the standard applied by the Board in determining the commission of an unfair labor practice by Lechmere is of recent formulation. See *Jean Country*, 291 N.L.R.B. No. 4 (1988). In *Jean Country*, the Board reframed the balancing test required by the Supreme Court in the case of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). To my view, it did so in a manner that attempts to circumvent the quintessential elements of that seminal decision.

In *Babcock & Wilcox*, as in the present case, the employer refused to permit distribution of union literature by non-employee union organizers on a company-owned parking lot. The Board found "that it was unreasonably difficult for the union organizer[s] to *reach* the employees off company property," *Babcock & Wilcox*, 351 U.S. at 106 (emphasis added), and held that the refusal of access to the parking lot impeded the employees' right to self-organization in violation of § 8(a)(1) of the Act. The employer in *Babcock & Wilcox* was engaged in manufacturing, and its plant was located on a 100 acre tract about one mile from a community of about 21,000 people, in which lived about 40% of its 500 employees, the rest living within a 30 mile radius. The parking lot could be reached from a driveway which was entirely company property, except for a 31 foot public right-of-way extending from the highway. This strip was the only public place in the immediate vicinity of the plant at which leaflets could be distributed to employees. The Board found that, because of

traffic conditions at that place, it was "practically impossible for union organizers to distribute safely to employees in motors [sic] as they enter[ed] or [left] the lot." *Id.* at 107. The union had used the mails to communicate with over 100 employees, and had also visited homes and talked to employees on the telephone. The company had a non-discriminatory no-solicitation policy prohibiting such actions by non-employees on company grounds.

On these facts, the Court reversed the Board's conclusion that a violation of § 8(a)(1) had taken place. It ruled that the Board erroneously applied cases involving "employees isolated from normal contacts," *e.g.*, "personal contacts on streets or at home, telephones, letters or advertised meetings." *Id.* at 111. The Court ruled:

It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other *available channels of communication* will enable it to *reach* the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution . . .

. . . [I]f the location of a plant and the living quarters of the employees place the employees beyond the *reach* of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

The plants are close to small well-settled communities where a large percentage of the employees live. *The usual methods of imparting information are available. The various instruments of publicity are at hand.* Though the quarters of the employees are scattered they are in reasonable *reach* . . . .

*Id.* at 112-13 (citations omitted, emphasis added).



Try as I may, I fail to see any significant factual or legal distinction between those presented in *Babcock & Wilcox* and those in this appeal. A factual comparison is illustrative:

	<b>Babcock &amp; Wilcox</b>	<b>Lechmere</b>
(1) Nature of business	Manufacturing plant	Retail store in shopping center
(2) Description of private property in question	Plant located in 100 acre tract, with parking lot 100 yards away from public highway	Store located in 13.5 acres with parking lot immediately adjacent to public highway
(3) Number of employees	500	200
(4) Number of employees contacted by Union through various means	100	41
(5) Percentage of employees contacted by the Union	20%	20.4%
(6) Means of communication available	Personal contact in streets and homes, mailings, telephone calls	Some personal contact at homes and through handbillings, mailings, telephone calls to homes, pickets at public entrance, newspaper advertisements
(7) Community characteristics	40% of employees live in town of 21,000, the rest in radius of 30 miles	89% of employees live in three "urban-suburban areas" (pop. 900,000) with a maximum distance of 15 miles between them
(8) Board's findings regarding organizational activity on public highway adjacent to private property	"practically impossible for union organizers to distribute safely"	"ineffective and unsafe"
(9) No-solicitation rule	Uniformly applied	Uniformly applied

The only materially different fact in *Babcock & Wilcox* from the instant case is that, in *Babcock*, union organizers had the opportunity to speak with employees on the streets of the town. But, in that case, only 20% of the employees were ever contacted in any way by the union, and the *Babcock* opinion gives no indication of how many of those had the opportunity for face-to-face contact. In the instant case, by contrast, 20.4% of the employees were reached by four different mailings, and the Union had telephone numbers for half of these same employees. The Union also made ten home visits. There does not appear to be any reason for the Union's failure to make home visits to all those employees for which it had addresses, although the Board's opinion does say that many of the employees' parents would not permit their children-employees to come to the telephone. But the point remains that the Union in this case had the opportunity for at least as much face-to-face contact as did the union in *Babcock*. Furthermore, although at first glance the populations in *Babcock* (21,000) and the present one (900,000) appear to be a differentiating factor in favor of the Union, the litmus test indicates otherwise: in both cases the unions were able to reach the same percentage of employees, 20%. See *Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971) (size of city, Chicago, did not alone make employees inaccessible in their homes). Thus the size of the communities in question did not affect the ability of the Union to reach its constituency.

Notwithstanding the obvious factual similarity between these two scenarios, the Board, although paying lip service to *Babcock & Wilcox*, concluded that Lechmere violated the Act by denying access by the Union to its property to conduct proselytizing activities. The difference in result between *Babcock & Wilcox* and the present case is the Board's newly-promoted *Jean Country* criteria, the crux of which is its balance-tipping dogma to the effect that barring "exceptional cases," the use of newspapers, radio and television will not be considered a



feasible alternative to direct contact with the employees. Thus, *Jean Country* brings about a skewed result whereby granting non-employee organizers entrance to employers' property to carry out their activities becomes the rule rather than the exception, a classic case of the tail wagging the dog. I can find support in neither the Act nor in *Babcock & Wilcox* for such a rule, and in fact I believe it to be in direct contravention to the Court's holding in that case.

My disagreement with the Board stems from various sources, not least of which is its pointed disregard of the indistinguishable factual basis of the present case with *Babcock & Wilcox*. See, *ante* at 34. It is not only in the factual context, however, that *Jean Country* and the Board's decision in the present case transgress the principles laid down by the Court in *Babcock & Wilcox*. The clear impact of *Babcock & Wilcox* is that, in balancing the competing rights of the employer and the union, the Board should take into account the availability of "[t]he usual methods of imparting information . . . [by the union, including] . . . [t]he various instruments of publicity . . . at hand." *Babcock & Wilcox*, 351 U.S. at 113 (emphasis supplied). Yet the Board, under the guise of fact-finding and "expertise," in one clean swoop not only wipes out these specific directives but declares nonexistent and impotent "the usual methods of imparting information" used by the entire advertising and publicity industry. This is a clearly unreasonable and arbitrary conclusion considering that these are the very tools normally used effectively by the political and commercial processes of this country, where in most cases actual personal contact is either minimal or absent. There is, of course, *nothing in this record*, or in *Jean Country*, to support such a wide sweeping conclusion by the Board, whether it be considered a factual or a legal finding.

The Board's ruling in this case, and in *Jean Country*, to the effect that the use of newspapers, radio and television are ineffective methods of imparting information is not entitled to any

deference under any of the recognized standards of review, all of which are ably recapitulated by the majority decision, *ante* at 9-10. If this be a factual determination, as stated above, there is not a scintilla of evidence much less "substantial" evidence to support it. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); see also 29 U.S.C. § 160(e). If this be the application of law to fact, it is reviewable under the same standard, see *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968), and thus fails for the same reason. If the Board's resolution is seen as a mixed question of fact and law, it is entitled to deference only if it is factually reasonable and legally sound, i.e. so long as the Board's conclusion derives *plausibly* from the record. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). This is clearly not the present case, as the record is bare of any such support. The last possibility, one not mentioned by the majority but which would seem to best characterize the real nature of the Board's actions in this case and *Jean Country*, is that the Board has attempted to exercise its rule-making authority. See 29 U.S.C. § 156; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). If this be the case, the Board is equally lacking in support for its action, as "it is not entitled to disguise policymaking as fact-finding, and thereby to escape the legal and political limitations to which policymaking is subject." *NLRB v. Curtin Matheson Scientific, Inc.*, *supra*, 110 S. Ct. at 1566 (Scalia, J., dissenting). See 29 U.S.C. § 156; *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (Board cannot replace the rule-making requirements of the Administrative Procedure Act with a rule-making procedure of its own invention).

The principal flaw in the Board's reasoning is that it equates an apparent *lack of interest* by Lechmere's employees with the Union's organizing campaign, with a lack of alternative means to *reach* these employees. The Board misconstrues *Babcock & Wilcox* in this respect. All that *Babcock & Wilcox* assures the Union is the *opportunity to reach* employees through "[t]he

usual methods of imparting information." *Babcock & Wilcox*, 351 U.S. at 113. *Babcock & Wilcox* is not a guarantee of success, it is only a guarantee of an *opportunity to reach* the employees with the Union's message.

The record in this case shows that the Union had ample opportunity to reach the employees. In fact, the Union was able to contact at least as many employees, percentage-wise, as the union in *Babcock & Wilcox*. Furthermore, the Union had a more diverse organizational campaign, and had more means available to impart its information, than did the union in that case, including the ability to carry out a six-month-long informational picket at the entrance to Lechmere's parking lot. Furthermore, the employees' homes in the present case were concentrated in a smaller geographical area than in *Babcock & Wilcox*. Although the total population in that area was considerably larger here than in *Babcock & Wilcox*, as it turns out, this is ultimately a neutral factor in the present case as the Union was able to *reach* the same percentage of employees, 20%, as in *Babcock & Wilcox*. Perhaps, as intimated by the Board's findings, *Lechmere, Inc.*, 295 N.L.R.B. No. 15, at note 10, the lack of receptivity of Lechmere's employees was due to the large number of teenagers composing its work force whose parents were apparently opposed to their children joining the Union. If that be the case, although unfortunate from the Union's viewpoint, it is certainly not a condition for which Lechmere can either be faulted or penalized in the exercise of its property rights.

The bottom line is that the Board has reached a wrong and unsupported conclusion in finding that the Union did not have reasonable alternative means of communicating with Lechmere's employees. In applying the *Babcock & Wilcox* balancing test, the Board, without any basis, labeled means of communication other than personal contact as ineffective. The Board has erroneously displaced the *Babcock & Wilcox* standard, which is reasonable opportunity to *reach* the employees with the union's message, and replaced it with a mechanistic

approach which totally disregards "usual methods of imparting information," and is unfounded on the record.

Examination of previous application of the Supreme Court's standard illustrates how far the Board has deviated from *Babcock & Wilcox* in steering its present course under *Jean Country*. For example, non-employee access was allowed to company property in Alaska where the mining employees lived and worked on an island, and where they could only get to the mainland by chartered seaplane or boat. *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972), *enf'd*, *NLRB v. Alaska Barite Co.*, 83 L.R.R.M. (BNA) 2992 (9th Cir.), *cert. denied*, 414 U.S. 1025 (1975); *Husky Oil, N.P.R. Operations, Inc. v. NLRB*, 669 F.2d 643 (10th Cir. 1982). Access by outside organizers was also granted in the case of company-owned towns, *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949), self-contained labor camps, *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73 (5th Cir. 1973), isolated resort hotels wherein employees lived on the premises, *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967), and lumber camps in which the employees lived in company-provided and regulated housing, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). However, access to the employer's property has been denied to non-employee union organizers in a variety of situations factually relevant to the present circumstances. For example, in *Monogram Models, Inc.*, *supra*, the Board ruled that the union was not entitled to access to the employer's property because it could reach the employees as they drove off a highway and down a 30 foot access road into the plant, and could reach employees at transportation pickup points in the city, or at their homes by mail, telephone and personal visits. The size of the city, Chicago, did not alone make employees inaccessible in their homes. In *Falk Corp.*, 192 N.L.R.B. 716 (1971), the Board denied access where the union was able to pick out the employees' license numbers as they left the plant and thereafter get their home addresses from the state license bureau. A similar result was reached by the Board in *Lee*



*Wards*, 199 N.L.R.B. 543 (1972), which involved the parking lot of the employer's retail store, in which it was ruled that reasonable access to employees existed because organizers could stand on an easement adjacent to the parking lot and record the license numbers of the cars entering the lot before the employer's retail hours. See also *NLRB v. Solo Cup Co.*, 422 F.2d 1149 (7th Cir. 1970). And in *NLRB v. Sioux City & New Orleans Barge Lines, Inc.*, 472 F.2d 753 (8th Cir. 1983), the court ruled that a union did not have the right to board river towboats to reach employees who worked shifts of 30 to 60 days, where the record showed that with extra effort, the union could achieve personal meetings with off-duty employees without boarding the towboats. All of the above clearly illustrate that *Babcock & Wilcox* requires that "employees [be] isolated from normal contacts," *Babcock & Wilcox*, 351 U.S. at 111 (emphasis supplied), before entry to the employer's property is required.

*Jean Country* is just another of the Board's periodic attempts to expand *Babcock & Wilcox*, all of which have, in the past, received little encouragement from the courts. A clear example of this was the Board's attempt to apply First Amendment criteria to organizational activity in private shopping centers. Although it met with some initial success, see *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court eventually rejected this end-run tactic and it is now well-settled that the *Babcock & Wilcox* rationale is controlling. See *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

Although adaptation of the Act "to changing patterns of industrial life is entrusted to the Board," *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266, thus allowing the Board to reappraise prior rulings, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a

consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). At the very least, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency . . . act[s] in the first instance." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). It is this reasoned analysis which the Board has failed to provide. *Ex cathedra* dogma is hardly reasoned analysis, particularly when we consider that what the Board is attempting to accomplish is the reversal of Supreme Court doctrine. Such imperious conduct can hardly be countenanced from an administrative agency which the law prohibits from acting in an arbitrary or capricious fashion. 5 U.S.C. § 706(2)(A); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

For the above reasons, I respectfully dissent.



United States Court of Appeals  
For the First Circuit

No. 89-1683.

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

DECREE

ENTERED: September 17, 1990

This cause came on to be heard on petition for review and cross-application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

UPON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED ADJUDGED, AND DECREED AS FOLLOWS: The petition for review is denied, and the order of the National Labor Relations Board is affirmed and enforced.

By the Court:  
FRANCIS P. SCIGLIANO  
Clerk

[cc: Messrs. Joy and Cohen]

APPENDIX B

JHD

295 NLRB No. 15

D-9685

Newington, CT

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 39—CA—3571

LECHMERE, INC.

AND

LOCAL 919, UNITED FOOD AND  
COMMERCIAL WORKERS, AFL-CIO

DECISION AND ORDER

On September 30, 1988, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief as well as a supplemental brief<sup>1</sup> and the General Counsel filed cross-exceptions and a supporting and reply brief in which the Charging Party joined.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings, and conclusions, as explained below,

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record exceptions and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear prepon-

and to adopt the recommended Order.<sup>3</sup>

The judge found that the Respondent violated Section 8(a)(1) of the Act by denying access to its parking lot to nonemployee union organizers for the purpose of distributing leaflets and handbills to employees and by attempting to remove the union organizers from a 10-foot-wide strip of public property abutting its parking lot and the Berlin Turnpike. The judge found no violation of Section 8(a)(1) in the Respondent's installation of a video camera on the roof of its store to monitor the exterior areas adjacent to the store. We agree with the judge, but base our finding that the Respondent violated Section 8(a)(1) by denying the union organizers access to its parking lot on the analysis set forth in *Jean Country*, 291 NLRB No. 4 (Sept. 27, 1988).

In *Jean Country*, the Board reevaluated the analytical approach for resolving conflicts between Section 7 and private property rights set forth in *Fairmont Hotel*, 282 NLRB No. 27 (Nov. 13, 1986), and clarified that the availability of reasonable alternative means is a factor that must be considered in every access case in which a legitimate property interest and a Section 7 right must be accommodated.<sup>4</sup> The Board further held (slip op. at 9-10):

Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should

---

derance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> We attach a modified notice to conform the language with the judge's recommended order.

<sup>4</sup> In reaching this conclusion the Board emphasized that, under the Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Board is "charged with seeking to avoid the destruction of [Sec. 7 and property] rights, if at all possible, and with permitting infringements on one right only to the extent necessary to maintain the other." *Jean Country*, slip op. at 5-6.

be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis however, there is no simple formula that will immediately determine the result in every case.

The Board in *Jean Country* found that the following factors may be relevant to assessing the weight of a property right: the use to which the property is put; the restrictions, if any, that are imposed on public access to the property; and the property's relative size and openness. The factors that may be relevant to the consideration of a Section 7 right include: the nature of the right; the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute); the relationship of the employer or other target to the property to which access is sought; the identity of the audience to which the communications concerning the Section 7 right are directed; and the manner in which the activity related to that right is carried out. Finally, factors that may be relevant to the assessment of alternative means include: the desirability of avoiding the enmeshment of neutrals in labor disputes; the safety of attempting communications at alternative public sites; the burden and expense of nontrespassory communication alternatives; and the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

Applying the *Jean Country* analysis to this case, we initially find that the Respondent owns the Newington Lechmere store and the land occupied by, and immediately surrounding, the store. The Respondent also shares ownership in the parking lot adjacent to the store with the operators of a strip of 13 stores. The parking lot is available for use by patrons and employees of all the stores. Only 4 of the 13 stores were open and there were two public telephones in front of the strip stores when nonemployee union organizers sought to contact the Respondent's employees in June 1987. The Respondent maintains and



enforces rules against solicitation and distribution on its premises, and in the parking lot with the authorization of the operators of the strip of stores. We conclude that the Respondent's property right at issue is relatively substantial but note that the parking lots are essentially open to the public.<sup>5</sup>

The Section 7 right asserted is relatively strong. As the Supreme Court has indicated: "[T]he right to organize is at the very core of the purpose for which the NLRA was enacted. . . . [T]he interests being protected . . . are not those of the [non-employee union] organizers but of the employees located on the employer's property."<sup>6</sup> Here the Union targeted the parking lot used by the affected employees at their work site as the locale for invoking the organizational rights of those employees. As the Union's attempts to distribute handbills to the employees neither impeded traffic flow nor interfered with the normal use of the parking lot, the Respondent's business was not disrupted or its customers inconvenienced to any significant degree by the handbilling.<sup>7</sup> Accordingly, we find that consideration of the factors of the situs of the Union's conduct and the manner of that conduct does not diminish the strength of the core Section 7 right asserted. Under the circumstances, we find that the Section 7 right is certainly worthy of protection against substantial impairment.

Further, we find that there was no reasonable, effective alternative means available for the Union to communicate its message to the Respondent's employees. Thus the Board in *Jean Country* noted that only in "exceptional" cases will the use of newspaper, radio, and television be feasible alternatives to direct contact.<sup>8</sup> And we find that the present case is not an exceptional one. Newington, Hartford, and New Britain com-

<sup>5</sup> *Mountain Country Food Store*, 292 NLRB No. 100 (Feb. 10, 1989).

<sup>6</sup> *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42; citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

<sup>7</sup> The Respondent's assertions that the Union engaged in trespassory forays onto its property are not evidence of such disruption or inconvenience.

<sup>8</sup> *Jean Country*, *supra*, slip op. at 7.

pose a large "suburban-urban" area. The evidence shows that almost all the Respondent's approximately 200 employees live in these three communities that are serviced by local newspapers in which the Union placed advertisements seeking authorization for representation from the Respondent's employees. A newspaper's general circulation, however, is not evidence of receipt of a discrete message intended for a specific audience. Many of the Respondent's employees may never receive, purchase, or read these local newspapers, or may be exposed to them only occasionally.<sup>9</sup> Thus, this method of communication is both expensive and ineffective.

The evidence also shows that the Motor Vehicle Registry provides on request names and addresses pertaining to license plate numbers. By observing cars in the Respondent's parking lot, the Union thereby obtained 41 names and addresses of the Respondent's approximately 200 employees.<sup>10</sup> However, it is clear that even with diligence and perseverance, that method of obtaining employee names and addresses is flawed. Cars driven by patrons of the Respondent's stores as well as patrons and employees of the other stores in the complex frequent the parking lot daily. Even should the Union observers focus on the area where the Respondent's employees are encouraged to park their cars at times when these employees would be arriving at or departing from the store, obstacles to comprehensive tallying of names and addresses are manifest. Employees may use cars that are not registered in their names, may car pool together, may use alternative means of transportation, or may park elsewhere. In addition, part-time employees might not use the parking lot at those times shortly before and after the

<sup>9</sup> The advertisements used by the Union included an "Authorization for Representation" form with the admonition to complete and mail. The Respondent removed the advertisements from the newspapers delivered to its store.

<sup>10</sup> To these 41 employees, the Union sent 4 consecutive mailings. The Union also telephoned about a quarter of these employees (approximately 20 of the 41 had unlisted numbers) but often was unable to reach teenage employees whose parents refused to let them come to the phone to speak with the union organizers. The Union also made 10 home visits.



store's designated opening hours. Accordingly, the effectiveness of the Union's resorting to the Motor Vehicle Registry as a comprehensive source of the names and addresses of the Respondent's employees is patently minimal.

Finally, the evidence also shows that the 10-foot-wide strip of public property abutting the Berlin Turnpike offers an ineffective and unsafe locale for the union activity. The turnpike is a four-lane highway with a 50 m.p.h. speed limit. The presence of other stores in the immediate vicinity of the complex containing the Respondent's store suggests that the area is commercial in character and that traffic is more than minimal. Further contributing to the safety problem presented by this location is the lack of a traffic signal or stop sign at the turnpike entrance to the parking lot. The entrance is not limited to the Respondent's employees but also provides access for employees of the other stores in the complex and customers of all the stores. Indeed, the police summoned by the Respondent on June 20, 1987, cautioned the union organizers to be careful neither to impede traffic nor to endanger themselves when positioned on the 10-foot-wide strip of public property.

Accommodating the private property and Section 7 rights pursuant to our analysis in *Jean Country*, we find that the Respondent's property interest would suffer some impairment by granting the Union access to the Respondent's parking lot. We conclude that the impairment would not be substantial, however, in light of the unobtrusive manner in which the Union carried out its distribution of leaflets and the fact that the Respondent's parking lot is essentially open to the public. By contrast, in the absence of a reasonably alternative means of communication, the Union's Section 7 right would be "severely impaired — substantially 'destroyed' within the meaning of *Babcock & Wilcox*"<sup>11</sup> without entry onto the Respondent's property. Thus, we find that the degree of impairment of the Union's Section 7 right if its agents were denied access to the Respondent's parking lot to distribute

<sup>11</sup> *Jean Country*, *supra*, slip op. at 24.

organizational literature outweighs the degree of impairment of the Respondent's property right if access were granted. Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by barring representatives of the Union from engaging in organizational handbilling in the parking area of the Respondent's Newington store.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lechmere, Inc., Newington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 15, 1989.

---

WILFORD W. JOHANSEN, *Member*

---

JOHN E. HIGGINS, JR., *Member*

---

DENNIS M. DEVANEY, *Member*  
NATIONAL LABOR RELATIONS  
BOARD

(SEAL)

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO, or any other labor organization, from distributing union literature to our employees in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so, as long as the activity is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

LECHMERE, INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Commercial Plaza, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.

JD(NY)-81-88  
Newington, CT

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

Case No. 39-CA-3571

LECHMERE, INC.

AND

LOCAL 919, UNITED FOOD AND  
COMMERCIAL WORKERS, AFL-CIO

*Thomas Meiklejohn, Esq.*  
for the General Counsel.  
*J. William Gagne, Esq., and*  
*Barbara Collins, Esq.,*  
for the Charging Party.  
*Robert P. Joy, Esq.,*  
*Morgan, Brown, & Joy,*  
for the Respondent.

JOEL P. BIBLOWITZ, *Administrative Law Judge*: This case was heard by me on May 16 and 17, 1988 in Hartford, Connecticut. The Complaint herein, which issued on November 18, 1987,<sup>1</sup> and was based upon an unfair labor practice charge filed by Local 919, United Food and Commercial Workers, AFL-CIO, herein called the Union, alleges that Lechmere, Inc., herein called Respondent, violated Section 8(a)(1) of the Act in the following manner: (1) On about June 14 refused to permit representatives of the Union to engage in organizational picketing and handbilling in the parking area at its Newington store. (2) On about June 20, attempted to cause representatives of the Union to be removed from public prop-

<sup>1</sup> Unless, indicated otherwise, all dates referred to herein are for the year 1987.

erty adjacent to the parking area of the store, where they were attempting to distribute organizational handbills to occupants of vehicles. (3) Since about July 15 has operated a revolving video camera on the roof of the facility, thereby engaging in surveillance of its employees' union activities.

Upon the entire record, including the briefs received from the parties, I make the following:

### Findings of Fact

#### I. Jurisdiction and Labor Organization Status

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. Facts

##### A. Background

Respondent operates a number of stores selling "hard goods", i.e., televisions, audio equipment, appliances and watches, but not clothing. The only store involved herein, hereby referred to as the store, is located in Newington, Connecticut, on the west side of the Berlin Turnpike, a four lane divided highway with a 50 mile per hour speed limit. The store is located on a parcel of land bounded on the east by the Berlin Turnpike and on the north by Pascone Street. The parcel measures approximately 880 feet from north to south and 740 feet from east to west. The store is located at the south end of the property. A main parking lot is to the north of the store and extends to Pascone Street. A smaller parking area is located to the east of the store. A strip of 13 small "satellite stores" runs along the west side of the parcel facing the parking lot; there are no restaurants or convenience

among these satellite stores. As of June 1987, only about 4 [sic] these stores were occupied. These stores are not owned by Respondent, and are approximately 100 feet from the store at the nearest point. There are two public pay telephones located in front of the satellite stores; there are also public phones inside the store that are not visible from the outside. Ownership of the parcel of land is divided among Respondent and Newington Commercial Associates Limited Partnership, herein called Newington Commercial. Respondent owns the land occupied by and immediately surrounding its store. Newington Commercial owns the satellite stores. The remainder of the parking lot is jointly owned by Respondent and Newington Commercial. Konover Management Corporation, a general partner in Newington Commercial Associates, has management responsibility for the satellite stores. A grassy strip approximately 46 feet wide runs the entire length of the property along the Berlin Turnpike, with the exception of two breaks in that strip for entrances to the parcel. The 42 foot width of that grassy strip along the Berlin Turnpike is public property. The remainder of the grassy strip is Respondent's property.

There are three entrances to the property; the main entrance is from the Berlin Turnpike. It begins with an opening through the grassy strip (actually, two openings, one an entrance and the other an exit) referred to, *supra*, and it continues in a westerly direction on the north side of the main entrance to the store and continues to, and ends at, the satellite stores. The principal parking area for the store and the satellite stores is on the north side of this road. At this main entrance, the grassy strip continues in a westerly direction for an additional distance (approximately fifty feet) on the north side of the entrance only; this patch of land, admittedly owned by Respondent, will be referred to herein as the dog leg. There is another entrance to the property from Pascone Street, north of the store (and east of the satellite stores), and facing the front end of the store. This is the furthest entrance from the store and feeds into the main parking area. The final entrance to the



property is at the most southerly point of the property, going from the Berlin Turnpike to the rear of the store. This entrance is meant for deliveries to Respondent and connects to a loading dock at the rear (south end) of the store.

There are two entrances to the store; the main entrance, which faces north and the main parking area, and a pick up entrance on the east side of the store (across from the grass strip just south of the main entrance) facing a small parking area principally used by customers picking up parcels at the store. The principal parking area is north of the store, between it and Pascone Street. Employees are requested to park in the most easterly portion of this area closest to the grass strip and the Berlin Turnpike, and to enter the store through the pick-up entrance.

Grossman's Home Improvement Center store is located south of the store, separated by a fence running east to west behind the store; the fence does not extend across the grass strip. There is a sign located at the main entrance to the property which identifies two of the stores on the parcel, "Lechmere" and "Card Gallery." There are no signs in the parking lot announcing any restrictions on access to or use of the parking lots other than signs identifying certain parking spaces as "Handicapped Parking." There are two 6" by 8" signs on each set of doors to Respondent's store which read, "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises."

Respondent established a No Solicitation/No Distribution policy in 1982 that has remained in effect to the present time; the only change in the policy was to change the word "employee" to "associate" in 1986 when Respondent began referring to its employees as associates. The policy states:

Solicitation of associates in the work areas during working time is strictly prohibited. It is strictly prohibited in all selling and public areas at all times. Non-working time includes break periods, meal periods and other specified

periods during the work day when associates are properly not engaged in performing their work tasks. Distribution of literature in work areas and public selling areas is prohibited.

Non-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

Beginning on June 16 the Union placed advertisements in newspapers in an attempt to organize the employees at the store; at the time Respondent employed approximately two hundred employees at the store, none of whom were represented by a union. The first ad, and later ads as well, was addressed to Respondent's employees, told of the better benefits available with the Union, and included a Union authorization card, with the caption: "Mail Today" or "Mail it Now."

#### *B. Events of June 18*

Liša Meuci, organizer for the Union testified that on June 18 she and other Union representatives went to the facility between 9:15 and 9:30 a.m. and placed handbills on the cars that arrived and parked between 9:30 and 10:00 a.m., assuming that they were employees (the store opens for business at 10:00 a.m.).<sup>2</sup> In addition, Union organizer Giovano Casserino handed a leaflet to an employee who was walking toward the store, but a security guard took the leaflet from the employee. Roger Samuelson, the general manager of the store, testified that on June 18 Union representatives were in the parking lot

<sup>2</sup> Shortly after the store opened that morning, the Union's representatives attempted to distribute literature to employees in the store until they were stopped from doing so by Respondent's representatives.

on three occasions placing leaflets<sup>3</sup> on car windshields. On these occasions, they were in the area where employees usually park and he instructed the security guards to remove the literature from the cars (which they did) and he and the assistant store manager, Steve Mittler, asked the Union representatives to leave the parking lot.

### C. *The Events of June 20*

The events of this day are more substantial, as is the credibility issue between the version testified to by the four Union representatives and the testimony of Samuelson. Meuci testified that at about 9:30 a.m. she met the other Union representatives at the Bradlee's store parking lot across the street (east) from the store; they then drove to the Grossman's store just south of the store and from there walked north up the grassy strip to the main entrance to the parking lot. They stood on the grassy strip within a few feet from the Berlin Turnpike, on both sides of the main entrance to the parking lot (between 9:30 and 9:40 a.m.) attempting to give handbills to drivers entering the parking lot at this point (assuming that they were employees). About three to five minutes later (before they had handed out any literature) Samuelson, Mittler and three security guards came out of the store and said that they were on Respondent's property and asked them to leave. They said that they thought that since they were on the grassy strip near the Berlin Turnpike that they were on public property. Samuelson said that it was Respondent's property, and unless they left he would call the police. When they did not leave Samuelson went into the store to call the police. Ten minutes later the police arrived and questioned the Union representatives about their purpose. Officer Gallagher told them that they were on public property, but that they were so close to the Berlin

<sup>3</sup> The leaflets used by the Union on June 18 and thereafter extolled the advantages of the Union and had an attached Union authorization card for the employees to complete and a stamped self-addressed envelope.

Turnpike that it could be dangerous remaining there if they were not careful. Gallagher then spoke privately with Samuelson, after which he called his sergeant. Before leaving, Gallagher told the Union representatives that they could remain, but they couldn't obstruct the traffic flow on the highway or leading into the parking lot. Because the security guards continued to videotape their movements, Meuci and the others then left the area.<sup>4</sup>

Casserino testified that he met Meuci, Mark Espinosa (Union business representative) and Cliff Gagnon (recording secretary of the Union) that morning in the Bradlee's parking lot and they drove to Grossman's parking lot. From there they walked north on the grassy strip to Respondent's parking lot where they stood by the main entrance to the parking lot about four feet from the Berlin Turnpike. About five minutes later Samuelson came out of the store and told them to leave. They protested they were on public property and wouldn't leave. Samuelson said that it was Respondent's property and they should leave immediately. They refused. About five minutes later two policemen arrived. One asked what they were doing; they said that they were on public property attempting to speak to employees on their way to work. The officer went to speak to Samuelson and when he returned he told them that since they were on public property they could remain, but they should be careful because of the speed of the nearby traffic. At no time that day did the Union representatives leave the area about four feet from the Berlin Turnpike and enter Respondent's property and at no time after the police arrived did Samuelson or any other representative of Respondent tell them to leave.

Espinosa testified that he met the other Union representatives that morning at Bradlee's parking lot and walked (by himself) across the Berlin Turnpike to the grassy strip on the

<sup>4</sup> The affidavit she gave to the Board states: "The police explained to the employer that we were on state property, but he told us we might disrupt traffic flow and must leave. We left."



side of the main entrance to Respondent's parking lot where he met the others. He and the others stood there, about four feet from the Berlin Turnpike ("We figured that's where we had a right to be"). Respondent's representatives approached them and Samuelson said that they had to leave Respondent's property. They said that they had a right to be there and Espinosa asked if Respondent owned the property all the way to the Berlin Turnpike. Samuelson asked them if they were going to leave and they said that they weren't and he said that he would call the police. When the police arrived they told the police that they were there to distribute literature and felt that they had a right to be there, but that they didn't want to cause any problem, and if they were asked to leave, they would do so. The policeman then spoke to Samuelson for a few minutes; when he returned he told them that they had a right to remain there as long as they remained within ten feet of the curb, but that they should be careful because of the speed of the cars on the Berlin Turnpike. From the time he arrived he never left the area about four feet from the Berlin Turnpike until they left after the police spoke to them. They left the premises that day, but not because they were requested to do so by Samuelson; in fact, Samuelson never spoke to them, again, after the police arrived. Gagnon testified that he met the other Union representatives at the Bradley's parking lot that morning; they then drove to the Grossman's parking lot and walked along the grassy strip to the entrance to the parking lot of Respondent's store arriving at about 9:30 a.m. They stood a few feet from the Berlin Turnpike preparing to give leaflets to cars entering the parking lot. Within a short time Samuelson came out of the store and told them to leave because they were on Respondent's property. Gagnon (and the others) said that they were on public property and had a right to be there. Samuelson said that Respondent owned the entire area including the grassy strip and asked them to leave. When they refused to leave he said that he would call the police. A few minutes later the police arrived; they first spoke to Samuelson and then asked

the Union representatives what they were doing. Gagnon told him that they were attempting to give handbills to employees entering the parking lot and that Samuelson had said that they were on private property and he had disagreed. After the police officer called his office he told them that they were on public property. The police left and the Union representatives remained in the same place for about five minutes and then left: "We'd proved our point, that we could stay on the grassy area."

Samuelson testified that at 9:22 a.m. on June 20, Gagnon and Espinosa drove into the parking lot at Respondent's store and began putting leaflets on cars parked in the parking lot. Samuelson then told them of Respondent's no-solicitation rule and they left and drove their car into Grossman's parking lot. About twenty minutes later Gagnon and Espinosa (together with Meuci and Casserino) were back in Respondent's parking lot (they had walked from Grossman's) on the dog leg of the grassy strip at the main entrance to the parking lot, about one hundred feet from the Berlin Turnpike. As stated, *supra*, this property is owned by Respondent.<sup>5</sup> Mittler and Samuelson told them of the no-solicitation rule and asked them to leave; when they did not leave Samuelson called the police. Prior to the police arriving, one of the Union representatives asked Samuelson what part of the area Respondent owned and asked if they owned the Berlin Turnpike. Samuelson said that of course they didn't, but he never specified where the dividing line was between their property and public property. The police arrived and asked what the problem was; Samuelson said that they were trespassing on his property and he wanted them to leave. The officer then spoke to the Union representatives and returned and told Samuelson that he told them that they could remain on the public area, but had to stay off Respondent's property.

<sup>5</sup> In an Incident Report that Samuelson prepared that day, he stated that he saw the four individuals in "the grass area" (which could describe the grassy strip as well as the dog leg) and never specified that they were on Respondent's property.



I was happy with that solution, because that was my intention, to keep them off of Lechmere property, and had full knowledge that they had the right to be on the public way.

The police left, as did the Union representatives five or ten minutes later. On cross-examination Samuelson testified that when he initially saw that the Union representatives had returned to Respondent's parking lot, they were on the dog leg (Respondent's property), but by the time he approached them and told them to get off Respondent's property, they were on the grassy strip (public property). Regardless of the fact that they were on public property he still told them to get off Respondent's property. He was then asked if he told them that he was going to call the police, even though they were then on public property; he testified: "The police had already been called, as I was coming out the door." The Incident Report referred to *supra*, states: "I then told them I would call the police if they did not leave our property. They didn't leave so we called the police."

#### D. Other Union Attempts to Contact Employees

In addition to the newspaper advertisements referred to *supra*,<sup>6</sup> the Union was able to obtain the name and addresses of forty one nonsupervisory employees of Respondent by writing the license number of their car. In Connecticut, the Department of Motor Vehicles will give you the name and address of the owners of automobiles if you supply the license plate number. Meuci testified that they made phone calls and house calls to these employees, but they were generally unsuccessful because the employees were often high school students and "generally the parents would intervene" and not allow

<sup>6</sup> The advertisements were placed in the Hartford Courant, one of the largest circulation newspapers in Connecticut. Meuci testified that she was told that its circulation covers Hartford, New Britain and Newington, among other areas.

them to talk to their children, the employees. This was the result of about ten home visits and eight or nine telephone calls by Meuci. In addition, using the name and address list received from the Department of Motor Vehicles, Respondent sent four mailings to the forty one employees listed; these mailings told of the benefits of joining the Union and included Union authorization cards; only one employee returned a signed authorization card.

Samuelson testified that in June one hundred seventy-nine of the two hundred employees of Respondent resided in Newington, Hartford and New Britain; the maximum distance between these points is about fifteen miles.

#### E. Prior Enforcement of No-Solicitation

Samuelson testified to a number of other occasions where he acted to enforce Respondent's no-solicitation rule. Shortly after the store opened for business in November 1966 [sic], Samuelson observed that someone had put leaflets advertising the American Automobile Association (AAA) on cars in the parking lot; he had the leaflets removed, called the AAA and told the branch manager that Respondent had a no-solicitation policy and could not allow them on the property to solicit or distribute handbills. In about November 1986 Samuelson received a telephone call from the Salvation Army, asking if they could station one of their bell-ringers in front of the store for the Christmas season: "I had to tell them no, again based on our no-solicitation policy. And wished them well with their campaign, but it would have to be not on Lechmere property." A few months later cents-off coupons from Burger King were found on cars in the parking lot; Samuelson called the store manager and told him of Respondent's no-solicitation rule and that such distributions would not be allowed. A few months later, two Girl Scouts were selling cookies in front of the store; he told them of Respondent's no-solicitation policy and that they would have to leave, and they did.

Samuelson testified that the purposes of the rule are to keep people from harassing Respondent's customers ("shaking cans in your face . . . asking to buy raffle tickets or cookies . . .") and to keep "illegal trespassers" off the property thereby preventing incidents or other confrontations in the parking lot. Samuelson testified that illegal trespassers would be "anyone that would be coming to the store not for the purpose of shopping, but for the purpose of distributing literature, raising funds for a church, a bake sale. . . ." He testified that when he was first told of the rule he was not told that one purpose of it was to keep union solicitors off the premises. Samuelson was asked whether one of the reasons he attempted to keep the employees from receiving the Union's leaflets was to make it less likely that the Union would successfully organize his employees. He testified: "It's very difficult to answer. I think my primary reason was to continue the consistent enforcement of the no solicitation policy."

#### F. Video Camera

The final allegation herein is that by placing a video camera on the roof of the store on July 23 Respondent violated Section 8(a)(1) of the Act. Samuelson testified that of the twenty-four stores operated by Respondent, sixteen to eighteen have video cameras. At the store in question, the loss prevention office has nine television monitors, each of which is a closed circuit television system with a camera and monitor. Only one of these cameras (with attached monitor) — the one on the roof — is in question here. The picture from only one of these monitors can be taped at any one time. Samuelson testified that the video camera was ordered on July 21 or 22 and installed on the roof to monitor illegal activity in the parking lot and to assist with in-store security. As regards the former, there have been situations where a car window was broken and car radios was [sic] stolen; the video camera assisted Respondent on one such occasion where they observed such an incident occurring, the

police were called and the perpetrator was apprehended. As regards the latter, the rooftop video camera gives the security officer in the store the ability to follow the path of a suspected shoplifter as he leaves the store.

The Union picketed the grassy area regularly from August 7 through September 5, then intermittently from October through March 1988; these pickets were never asked to leave by Respondent's representatives. During the first few days of this picketing in August, the rooftop video camera was directed at some of the pickets and the proceeding was being videotaped ("because I had no idea what was going to happen"). After several days Respondent ceased focusing the camera on the pickets ("Because nothing had happened that would be of any significant matter.").

Charles Lieberman, who was employed by Respondent from about September 1986 (when the store opened for business) through October, testified that at a regular meeting of employees subsequent to the installation of the video camera, somebody asked Samuelson why the camera was installed; "Mr. Samuelson said basically two things. One for general security. And, two, in order to assure that the Union people wouldn't be harassing customers or possibly vandalizing cars. That kind of thing."

#### III. Analysis

The initial allegation in the complaint is that since on about June 14 (really June 18) Respondent has refused to permit Respondent's [sic] representatives to engage in organizing and handbilling in the parking area adjacent to the store. The evidence establishes that between 9:30 and 10:00 a.m. on June 18 the Union representatives placed handbills on the cars parked in the area frequented by employees, but these handbills were removed at the request of Samuelson. Casserino handed a leaflet to an employee, but a security guard took the leaflet from the employee. In addition, Samuelson and Mittler asked



the Union representatives to leave the parking lot because it was Respondent's property.

In *Fairmont Hotel Company*, 282 NLRB No. 27 the Board set forth the balancing test to be used in situations such as the instant matter. The Board discussed *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *Hudgens v. NLRB*, 424 U.S. 507 (1976) and determined that in cases involving conflicts between property rights and Section 7 rights, the Board's task is "first to weigh the relative strength of each parties' claim."

If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

*Fairmont* (and later cases such as *United Supermarkets, Inc.*, 283 NLRB No. 130 and *Emery Realty, Inc.*, 286 NLRB No. 32) then speaks of factors affecting the strength and weakness of the employer's property rights and the Union's Section 7 rights. Applying the *Fairmont* criteria to the instant matter, I find the Union's Section 7 rights more compelling than Respondent's property rights. This is not an area standards dispute a union has with a secondary employer as in *Fairmont*; this is the Union's attempt to organize Respondent's employees. As the Supreme Court stated in *Sears Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978): "the right to organize is at the very core of the purpose for which the NLRA was enacted." In addition, the Union's activity was such that there was little likelihood that Respondent's customers, or the employees of the few satellite stores then open, were affected because the Union placed handbills

only on cars parked in the area where Respondent's employees were told to park (not the most convenient to the main entrance to the store) and generally did so before the store opened at 10 a.m. By contrast, Respondent's property rights are not as compelling. Although Respondent has uniformly enforced its no-solicitation/no-distribution policy since the store opened in November 1986, there are no signs at the entrances to the parking lot limiting entry in any way. The Board, in *Fairmont*, *supra*, at p. 8 differentiated between a multi-store mall and a single store:

the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation may well have a heavy burden to bear in seeking selectively to exclude pickets who are engaged in an economic strike against their employer who is a tenant of the mall. On the other hand, a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim.

Although the situation herein did not constitute a "large shopping mall" on June 18, it clearly was not a "single store surrounded by its own parking lot" as stated in *Fairmont*. Four of the thirteen satellite stores were open at the time and it is not unreasonable to assume that a large majority of the customers of these stores drove through the main entrance to the parking lot, and that some of these customers shopped at the store, as well as one or more of the satellite stores then open. Although the only "visible" pay telephones are in front of the satellite stores and there are no food or convenience stores or restaurants in the center, that does not diminish the fact that this is a shopping mall and that Respondent's property rights are subordinate to the Union's Section 7 rights herein. I therefore find that Respondent's actions on June 18 violated Section 8(a)(1) of the Act.



As I have found that the rights asserted by the Union and the Respondent are not relatively equal, it is unnecessary to consider reasonable alternative means available to the Union in attempting to communicate with the employees, *Fairmont, supra*. However, should my finding herein not be upheld, subsequently, I should state that the facts herein convince me that reasonable alternative means were available to the Union. Employees were easily recognizable here; they parked in specified areas and arrived at predictable times. Even if the Union representatives were unable to converse with them prior to entering the store, the Union could (and did) utilize the procedure of writing their license numbers and obtaining their names and addresses from the Connecticut Department of Motor Vehicles. The fact that a large majority of the employees rejected their solicitations does not distract from this; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them. In addition, the store is located in an urban-suburban area with one newspaper capable of reaching all or almost all of Respondent's employees. For these reasons I find that there were adequate alternate means of contacting the employees available to the Union.

It is next alleged that on June 20, Respondent, by Samuelson, attempted to cause the Union representatives to be removed from the public property adjacent to the parking lot, in violation of Section 8(a)(1) of the Act; I credit the testimony of the four Union representatives over that of Samuelson. Their testimony that they solicited solely on public property a few feet from the Berlin Turnpike is reasonable after their solicitation in the parking lot two days earlier had been rebuffed. In addition, although Samuelson appeared to be a credible witness, his testimony on this subject is difficult to understand. On direct examination he testified that when he saw them at about 9:47 a.m. they were on the dog leg (Respondent's property) and he called the police. According to his testimony on

direct examination, they did not leave the dog leg and stay on public property until after the police arrived. On cross-examination he testified that by the time he approached them they were on public property. He was asked why he asked them to leave if they were on public property and he testified that the police had already been called. Yet his Incident Report states that he told the Union representatives that unless they left "our property" he would call the police; when they refused to leave, he called the police. He never explained this contradiction. What is clear, however, is that when Samuelson did tell the Union representative to leave, they were on public property, where they had a right to be. As the Board stated in *Mike Yurosek & Son*, 229 NLRB 152 at 153: "If the alley were clearly public property, Respondent's attempts to exclude union representatives therefrom would be unlawful under Section 8(a)(1) of the Act." Samuelson's attempt to cause the Union representatives to be removed on June 20, when they were on public property, therefore violates Section 8(a)(1) of the Act.

Finally, the Complaint alleges that by installing the revolving videotape camera on the roof of the store on July 23, Respondent violated Section 8(a)(1) of the Act. An employer may photograph or videotape certain activities outside his plant without violating the Act where he can establish a legitimate purpose for this activity. *Russell Sportswear Corporation*, 197 NLRB 1116; the principal means of justification for this activity is to secure evidence for injunction proceedings to enjoin strike related conduct or to establish that the picketing was unlawful under the Act. *Bozzuto's Inc.*, 277 NLRB 977. Peaceful union activity cannot be a motivating factor in an employer's institution of a videotaping system. *Cutting Incorporated*, 255 NLRB 534, 543. Respondent does not defend on the basis that it was gathering evidence for a state court or Board injunction. Rather Samuelson testified that most of Respondent's stores supplement their in-store video security system with a rooftop camera and that was the purpose of this

camera — to monitor any illegal activity occurring in the parking lot and to allow the store's security people to "follow" a shoplifter (or other wrongdoer) out of the store via the video camera. Lieberman's testimony is not decisive here; he testified that Samuelson told the employees that the video camera was installed for general security and to assure that the Union people would not harass customers or vandalize cars in the parking lot. Although the Union representatives did enter the store on June 18 and attempted to speak to, or leave literature for, employees at that time, there is certainly no evidence that they harassed customers or vandalized cars at that time or at any time prior to July 23. On the other hand, I find credible and reasonable Samuelson's testimony that most of Respondent's stores have rooftop cameras and that the timing of the purchase of the camera for the store was not out of the ordinary compared with Respondent's other stores. For this reason (although not free from doubt) I find that the installation of the video camera on the roof of the store did not violate Section 8(a)(1) of the Act.

#### Conclusions of Law

1. Respondent, Lechmere, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by refusing to allow the Union representatives to engage in organizing and handbilling in the store's parking lot and by attempting to cause the Union representative to be removed from a public area adjacent to the parking lot.
4. Respondent did not violate the Act as further alleged in the Complaint.

#### The Remedy

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>7</sup>

The Respondent, Lechmere, Inc., its officers, agents, successors and assigns, shall:

##### 1. Cease and desist from:

(a) Prohibiting union representatives from distributing union literature to its employees in the parking lot adjacent to its store in Newington, Connecticut, and threatening them with arrest for attempting to do so, as long as the activity is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

##### 2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Newington, Connecticut, store copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said

<sup>7</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>8</sup> In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall

notice, on forms provided by the Regional Director for Region 34, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 34, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1988.

/s/ JOEL P. BIBLOWITZ  
JOEL P. BIBLOWITZ  
*Administrative Law Judge*

read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

After a hearing in which all parties were afforded the opportunity to present evidence, it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice.

WE WILL NOT prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO ("the Union") or any other labor organization, from distributing union literature to our employees in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

LECHMERE, INC.

(Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 34, 1 Commercial Plaza, Hartford, Connecticut 06103-3599, Telephone 203-240-3373.



APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. 89-1683

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

---

BEFORE

BREYER, Chief Judge,  
CAMPBELL, Circuit Judge,  
BOWNES, Senior Circuit Judge,  
and TORRUELLA, SELYA and CYR, Circuit Judges.

ORDER OF COURT

Entered: October 25, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Clerk

[cc: Messrs. Joy and Cohen]

3

No. 90-970

Supreme Court U.S.  
FILED

FEB 15 1991

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

KENNETH W. STARR  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

JERRY M. HUNTER  
*General Counsel*

D. RANDALL FRYE  
*Acting Deputy General Counsel*

NORTON J. COME  
*Deputy Associate General Counsel*

LINDA SHER  
*Assistant General Counsel*

LAURENCE S. ZAKSON  
*Attorney*  
*National Labor Relations Board*  
*Washington, D.C. 20570*

### QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the owner of a store in a shopping plaza violated Section 8(a)(1) of the National Labor Relations Act by barring nonemployee union personnel from distributing organizational literature to store employees in the plaza's parking lot.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	7
Conclusion .....	15

## TABLE OF AUTHORITIES

### Cases:

<i>Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) ...	6, 7, 8, 10, 12, 14
<i>Emery Realty, Inc. v. NLRB</i> , 863 F.2d 1259 (6th Cir. 1988) .....	9
<i>Fairmont Hotel Co.</i> , 282 N.L.R.B. 139 (1986)...	4, 8, 9
<i>Hardee's Food Systems, Inc.</i> , 294 N.L.R.B. No. 48 (May 31, 1989), aff'd <i>sub nom. Laborers Local 204 v. NLRB</i> , 904 F.2d 715 (D.C. Cir. 1990) .....	13
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	8, 12
<i>Jean Country</i> , 291 N.L.R.B. No. 4 (Sept. 27, 1988) .....	4, 9, 10
<i>Laborers' Local Union No. 204 v. NLRB</i> , 904 F.2d 715 (D.C. Cir. 1990) .....	9
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 110 S. Ct. 1542 (1990) .....	14
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975) .....	14
<i>Red Food Stores, Inc.</i> , 296 N.L.R.B. No. 62 (Aug. 31, 1989) .....	12-13
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978) ..	13

IV

Statutes:

Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 7, 29 U.S.C. 157 ..... 4, 5, 6, 7,

8, 9, 10, 12, 13

§ 8(a)(1), 29 U.S.C. 158(a)(1) ..... 4, 5

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. 90-983

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT*

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 914 F.2d 313. The Board's decision and order (Pet. App. B1-B29) are reported at 295 N.L.R.B. No. 15.

**JURISDICTION**

The judgment of the court of appeals was entered on September 17, 1990. A petition for rehearing was denied on October 25, 1990. Pet. App. C1. A petition for a writ of certiorari was filed on December 17, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

(1)

## STATEMENT

1. a. Petitioner operates a chain of retail stores, one of which is located in the Lechmere Shopping Plaza in Newington, Connecticut. Newington is part of the Greater Hartford metropolitan area, which has approximately 900,000 residents. Petitioner's Newington store employs about 200 employees. Petitioner owns the property occupied by and immediately surrounding its store, while an unaffiliated enterprise owns the property occupied by the satellite stores. Ownership of the plaza's parking lot and other property is divided nearly equally between the two. Although the parking lot is not marked by signs warning of restrictions on access or use, petitioner has consistently enforced a policy against nonemployee solicitation and distribution activities at the plaza. Pet. App. A2, A26, B3-B5, B10-B13, B19.

The main entrance to the plaza is from the Berlin Turnpike, a four-lane highway with a speed limit of 50 miles per hour. There is no traffic signal or stop sign at the entrance from the turnpike into the plaza. Abutting the turnpike is a 46-foot-wide grassy strip, most of which is public property; the strip is the only public property in the area of the plaza. Pet. App. A18 n.11, B6.

b. Beginning on June 16, 1987, Local 919 of the United Food and Commercial Workers (Union) began a campaign to organize the employees at petitioner's store by placing a series of five advertisements in the *Hartford Courant*, a general circulation newspaper serving the Greater Hartford area. The *Courant* has fewer than 100,000 daily subscribers, and it is unknown how many of petitioner's employees are among them. Petitioner systematically removed the Union's advertisements from papers delivered to its store. Pet. App. A4-A5, B5, B13, B18 & n.6.

On June 18, Union representatives placed handbills on the windshields of cars parked in the portion of the plaza's

parking lot where petitioner's employees had been told to park. Shortly after this handbilling began, the store's assistant manager informed the organizers of petitioner's no-solicitation policy and asked them to leave. The organizers left, and petitioner's security guards immediately confiscated the handbills. Union representatives returned to the parking lot twice that day to distribute handbills, but met with the same results. Pet. App. A5, B13-B14.

On June 20, two Union representatives began placing handbills on the windshields of cars parked in the area used by petitioner's employees. Almost immediately, petitioner's store manager asked them to leave. They complied. The Union representatives then attempted to pass out handbills to employees by standing on what they correctly understood to be public property abutting the main entrance to the plaza. Within five minutes, the store manager claimed that the organizers were on petitioner's property, demanded that they leave, and called the police to eject them. Although a policeman told the Union representatives that they had a right to remain on the public portion of the grassy strip, he urged them to take care because distributing literature from the strip was dangerous. Soon after, the Union organizers left. Pet. App. B14-B17, B24-B25.

Meanwhile, the Union secured the names and addresses of 41 employees by recording the license plate numbers from cars believed to belong to petitioner's employees, and then obtaining the names and addresses of the registered owners from the Connecticut Department of Motor Vehicles. The Union sent four mailings of literature to those individuals, made about ten home visits, and attempted to reach another ten employees by phone. Nearly half of the 41 had unlisted numbers, and several were high school students whose parents refused to allow the organizers to speak with them. Pet. App. A6, B5 & n.10, B18-B19.



2. The Union filed charges alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by denying the nonemployee Union organizers access to the parking lot for the purpose of giving handbills to employees, thereby interfering with the employees' rights under Section 7 of the Act, 29 U.S.C. 157.<sup>1</sup> Pet. App. B2. Relying on *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986), the administrative law judge found that petitioner's denial of access violated Section 8(a)(1). Pet. App. B22-B23.

Applying a different analysis, the Board affirmed. The Board relied on its recent decision in *Jean Country*, 291 N.L.R.B. No. 4 (Sept. 27, 1988), in which it declared that "in all access cases" it would balance "the degree of impairment of the Section 7 right if access should be denied \* \* \* against the degree of impairment of the private property right if access should be granted," and that an "especially significant" consideration in this balancing process would be "the availability of reasonably effective alternative means" of communication. Slip op. 9.

The Section 7 interest in this case, the Board stated, is the right of the employees to organize — a right "at the very core" of the Act. It observed that, because the Union's handbilling occurred in a parking lot and did not impede traffic flow or interfere with the lot's normal use, the handbilling did not "disrupt[]" petitioner's business or significantly "inconvenience[]" its customers. Because neither the handbilling's location nor the manner in which it was carried out diminished "the strength of the core Section 7 right

<sup>1</sup> Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

asserted," the Board found that the "Section 7 right is certainly worthy of protection against substantial impairment." Pet. App. B4.

Petitioner's property right, the Board found, was "relatively substantial," but was qualified by the fact that the plaza was "essentially open to the public." Pet. App. B4. The Board also pointed out that petitioner "shares ownership in the parking lot \* \* \* with the operators of a strip of 13 stores," and that the "parking lot is available for use by patrons and employees of all the stores." *Id.* at B3.

Finally, the Board found that "there was no reasonable, effective alternative means available for the Union to communicate its message to [petitioner's] employees." Pet. App. B4. The Board explained that, in the "large 'suburban-urban'" setting of Greater Hartford, the use of mass media — such as newspapers, radio, and television — was "both expensive and ineffective" as a means of communicating with petitioner's 200 employees. *Id.* at B4-B5. The Board also found that, despite the Union's "diligence and perseverance," the "obstacles to comprehensive tallying of [employees'] names and addresses" from license plate numbers of cars parked in the plaza parking lot were "manifest." *Id.* at B5. The Board further found that the high speed of traffic made the strip of public property abutting the turnpike "an ineffective and unsafe locale for the union activity." *Id.* at B6.

The Board concluded that "the degree of impairment" of the employees' Section 7 right to organize "if [union] agents were denied access to [petitioner's] parking lot to distribute organizational literature outweighs the degree of impairment of [petitioner's] property right if access were granted." It therefore found a violation of Section 8(a)(1). Pet. App. B6-B7.<sup>2</sup>

<sup>2</sup> In findings not at issue here, the Board also concluded that petitioner violated Section 8(a)(1) of the Act by attempting to remove the

3. The court of appeals enforced the Board's order. After reviewing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and later decisions of this Court discussing the right of access to private property under Section 7, Pet. App. A10-A12, the court concluded that the Board's *Jean Country* approach to the accommodation of conflicting rights in such cases is a "reasonable interpretation of the Act" that "meld[s] harmoniously with binding precedent." Pet. App. A14. The court rejected petitioner's contention that *Jean Country*'s balancing test conflicts with the approach laid down in *Babcock*. Pet. App. A12 & n.5, A14.

The court also rejected petitioner's contention that the Board had incorrectly applied the *Jean Country* principles in this case. Pet. App. A14-A22. After an extensive review of the Board's analysis, the court agreed that core Section 7 rights were at issue; that the exercise of those rights would not interfere with petitioner's business; and that without effective alternative means of communication, the Section 7 right at stake would be "substantially destroyed." Pet. App. A15.

Turning to "the crux of the dispute," the court upheld the Board's conclusion that the Union had no effective alternative means to reach petitioner's employees. Pet. App. A16, A22. In contrast to *Babcock*, where this Court found reasonable alternatives to exist, the court of appeals noted that without access to the parking lot, petitioner's employees could not be reached: "employees are not easily accessible or identifiable," the area involved in this case is "much more populous," and the Union's "good-faith effort to explore alternative routes" tended to reveal that other means of communication were ineffective. Pet. App. A17-A18. The court

---

organizers from public property abutting its parking lot, and that petitioner's installation of a video camera to monitor exterior areas adjacent to the store did not violate the Act. Pet. App. B2, B25-B26.

also noted that, without access, there was no way for the Union to speak with employees in person and that use of mass media would be prohibitively expensive. *Id.* at A19. Moreover, the court noted, the property right at issue here is far weaker than that at issue in *Babcock*; that case involved a private and secluded factory not open to the public, while, here, admission to the publicly accessible parking lot would be "minimally intrusive." *Id.* at A17, A19.

One judge dissented, finding this case indistinguishable from *Babcock*. Pet. App. A24-A28. The dissenting judge also took issue with the *Jean Country* test, believing that in assessing the union's alternative means it slights such methods of communication as newspapers, radio, and television, and that it equates the employees' lack of response to the union's message with the absence of adequate means for the union to reach employees. *Id.* at A28-A33.

#### ARGUMENT

Petitioner contends (Pet. 6-15) that the Board's *Jean Country* decision, as applied in this case to allow union personnel access to petitioner's parking lot to engage in organizational handbilling, conflicts with this Court's decision in *Babcock*. That contention is without merit. Moreover, those few courts of appeals that have addressed the issue have consistently concluded that the *Jean Country* approach represents a reasonable accommodation of employees' Section 7 rights and property rights. Accordingly, this Court's review is not warranted.

1. In *Babcock*, the Court declared that, where the exercise of Section 7 rights conflicts with property rights, the Board must seek to accommodate them "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. "[I]f reasonable efforts by the union through other available channels of communication



will enable it to reach the employees with its message," an employer may enforce nondiscriminatory rules barring nonemployees from distributing union literature on its property. *Ibid.* In contrast,

when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

*Ibid.* Applying that test to the facts presented, the *Babcock* Court found that nonemployee organizers were not entitled to access to the industrial plant's parking lot in order to distribute organizational literature to employees. The Court emphasized that the employees lived in a nearby town or its vicinity and could readily be reached through the mails, contacts on the town streets, home visits, and telephone calls. *Id.* at 106-107, 113-114.

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court reaffirmed the *Babcock* accommodation principle, but indicated that in making the accommodation the Board should take into account the character of all the rights involved. "The locus of that accommodation \* \* \* may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Id.* at 522. The Court left "the primary responsibility" for effecting the accommodation to the Board. *Ibid.*

Taking heed of *Babcock* and *Hudgens*, and in light of its experience in applying the Act, the Board reexamined its framework for making a proper accommodation in access-to-property cases in *Jean Country*. In *Fairmont Hotel*, 282 N.L.R.B. 139 (1986), the Board had announced a test under which the claim of Section 7 rights would be balanced against the strength of the property right involved, with the stronger right prevailing. Only if the rights

were deemed relatively equal in strength would the existence of reasonable alternative means of communication "become determinative." 282 N.L.R.B. at 142. In *Jean Country*, the Board concluded that "the availability of reasonable alternative means is a factor that must be considered in every access case." Slip op. 3.

To ensure the proper calibration of competing interests, the Board fashioned a multi-factor balancing test. *Jean Country*, slip op. 9-10. In keeping with *Hudgens*, the Board's test calls for a careful examination of the nature and strength of the Section 7 and property rights at issue. The "essential concern" is to balance "the degree of impairment of the Section 7 right if access should be denied \* \* \* against the degree of impairment of the private property right if access should be granted." Slip op. 9. In that analysis, the "availability of reasonably effective alternative means" is "especially significant." *Ibid.* In considering the adequacy of the alternative means, the Board stated that it will consider, among other factors, "the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message." Slip op. 8-9 (footnote omitted).

As the court of appeals explained, *Jean Country* reasonably implements the principles of *Babcock* and *Hudgens* and the policies of the Act committed to the Board's care. Pet. App. A14. Every court that has considered the issue has reached the same conclusion. *Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990); see *Emery Realty, Inc. v. NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988) (criticizing *Fairmont* and approving *Jean Country* in dicta).



2. a. Petitioner contends (Pet. 10-12) that *Jean Country* misapplies the alternative means requirement of *Babcock* by focusing not on whether the union can "reach" the employees through use of nontrespassory alternatives, but on whether the union is successful in using those alternatives. That contention misconstrues both *Babcock* and the Board's approach. *Babcock* requires not only that alternative means of communication be available, but that those "usual means" not be "ineffective" for the purpose of communicating with the employees. 351 U.S. at 112, 113. Nothing in the Court's opinion requires the Board to ignore the possibility that alternative means (such as mass media) might be too expensive or burdensome to constitute a realistic way for the union to disseminate its message.

Likewise, the Board does not base its access determinations on whether the employees are willing to listen to the union's message; rather, the Board's test focuses on whether there is a reasonable means for the union to convey that message at all. If the means of communication without access cannot reasonably transmit the union's message to employees, Section 7 rights may be impermissibly destroyed. The Board's statement in *Jean Country*, slip op. 9, that it would consider "the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message" does not mean, as petitioner suggests (Pet. 10), that the Board looks to the effectiveness of the "message" rather than the effectiveness of the "attempts." The statement merely reflects the truism that union communications that are unlikely to be heard by a large part of the intended audience are necessarily diluted in their effectiveness.<sup>3</sup>

<sup>3</sup> In *Jean Country*, the Board stated that "generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." Slip op. 7. The dissenting judge viewed that observation as creating an impermissible presump-

The Board's analysis in this case makes evident the error of petitioner's contention that the Board has "made the Union's success the primary indicator of whether the available non-trespassory means of communication were adequate and effective." Pet. 11. The Board focused specifically on the inadequacy of the avenues of available communication available, other than distribution of literature in petitioner's parking lot. The Board noted that, although the Union placed advertisements in the area's general circulation newspaper in an attempt to reach petitioner's employees, that approach was expensive and ineffective because the employees lived in a large "suburban-urban" area, and there was no showing that many of petitioner's employees received, purchased, or read this newspaper.<sup>4</sup> The Board further noted that, although the Union obtained some names and addresses of petitioner's employees from license plate numbers, that method was deficient, even with Union diligence and perseverance, because employees may use cars registered to others, may car-pool, may walk or take the bus to work, or may not park in the designated employee area. Finally, the Board found that the narrow strip of public property abutting the Berlin Turnpike afforded an unsafe and ineffective locale for the Union's handbilling activity. Pet. App. B5-B6. Those findings demonstrate the Board's concern to determine whether effective alternatives exist; they do not evidence an intention to ensure a positive employee response.

tion against common means of communication in modern society. Pet. App. A27-A28. The court, however, correctly viewed this statement "as no more than a prediction of probable outcomes in an increasingly urbanized society where use of mass media has become more and more expensive." *Id.* at A20 n.13.

<sup>4</sup> Petitioner's practice of removing the advertisements from the newspapers delivered to the store, Pet. App. B5 n.9, also vitiated the effectiveness of that medium of communication.

Nor did the court of appeals change the focus of the inquiry from the existence of alternative means to the level of enthusiasm of employee response. Contrary to petitioner's contention (Pet. 11), the court canvassed objective factors impeding the Union from communicating with the employees, and concluded that the Board's determination was "sufficiently record-rooted" to justify affirmance. Pet. App. A22.

b. Petitioner also errs in contending that *Babcock* requires the Board, in accommodating employee rights and private property rights, to skew the balance "in favor of private property rights." Pet. 13. *Babcock* directs the Board to accommodate the two rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. Neither right enjoys presumptive primacy over the other. In *Hudgens*, the Court reaffirmed that principle, adding that the "locus" of the accommodation of Section 7 rights and private property rights would likely "fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context." 424 U.S. at 522. If petitioner's presumption in favor of protecting property rights were accepted, the careful scheme of accommodation of conflicting rights envisioned by the Court would be upset, and core Section 7 rights protected by the Act would be subordinated to a nearly insurmountable preference for upholding property rights. *Babcock* did not decree such a one-sided regime.<sup>5</sup>

<sup>5</sup> Nor has the Board tipped the scales unduly in favor of access. Contrary to petitioner's suggestion (Pet. 12-13 & n.3), the Board, since *Jean Country*, has not invariably found that a union is entitled to access to private property. In several cases, the Board has held that the availability of alternative means of communication diminished a union's need to engage in trespassory conduct. See, e.g., *Red Food Stores, Inc.*, 296

Nor does *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), conflict with the Board's approach. The issue in that case was whether the Act preempts a state trespass action against a union engaging in area standards picketing; the Court held only that, when the union had not filed an unfair labor practice charge, the state-law action was not preempted. As petitioner notes (Pet. 12-13), the Court did state that an owner's property right to exclude trespassers is a strong right that will "[g]eneral[ly]" outweigh Section 7 rights in the ordinary trespass context. But the Court had no occasion to consider whether any particular alternative means of communication would be effective to protect Section 7 rights. Moreover, the Court expressly acknowledged that when the Section 7 right lies at the "very core" of the Act—such as "organizational solicitation," as is involved here—the argument for protecting the trespassory conduct is more "compelling." See 436 U.S. at 205-206 & n.42.

c. Finally, petitioner contends (Pet. 14-15) that the court of appeals' holding in this case "resurrect[s]" a position that this Court rejected in *Babcock*. But as the court of appeals took pains to explain, the circumstances in *Babcock* differ markedly from those of this case. Pet. App. A17-A22.

Although in both cases nonemployee union organizers sought to distribute handbills in a privately owned parking lot, the nature of the property interests and the availability of alternative means of communication in the two cases cannot be equated. The property involved in *Babcock* was a private parking lot, owned by the employer, adjacent to a factory in a secluded and remote location fenced off from the general public; this case involves an open parking lot

N.L.R.B. No. 62 (Aug. 31, 1989); *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), *aff'd sub nom. Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990).



in a shopping plaza where the public is invited, and, indeed, encouraged, to come. The court correctly characterized the magnitude of the property interest in *Babcock* as "significantly stronger." Pet. App. A17. Moreover, alternative means of communicating with employees in *Babcock* were "readily available" to the union because the factory was situated in a rural area near one small community. 351 U.S. at 114. Petitioner's store, in contrast, lies in the heart of a sprawling metropolitan area of 900,000 people, and the employees are scattered throughout. If the Union had unlimited time and money, perhaps it could saturate the region's mass media with organizational material and "reach" petitioner's 200 employees; but if that were the test for finding that "reasonable efforts \* \* \* through other available channels" constituted a sufficient alternative, *Babcock*, 351 U.S. at 112, Section 7 rights would have little practical value in a case like this one.

At bottom, petitioner's insistence (Pet. 14-15) that the Board has undervalued the means of communication commonly employed by "politicians and advertisers" reduces to a disagreement over the Board's appraisal of the efficacy of those methods when applied by a Union to reach a targeted group of employees. It is the Board, however, that is entrusted with the responsibility to give particularized content to the Act's policies. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1552 n.9 (1990); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board's decision in this case drew on its knowledge and experience in concluding that the Union lacked adequate alternatives to reach petitioner's employees.

## CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

JERRY M. HUNTER  
*General Counsel*

D. RANDALL FRYE  
*Acting Deputy General Counsel*

NORTON J. COME  
*Deputy Associate General Counsel*

LINDA SHER  
*Assistant General Counsel*

LAURENCE S. ZAKSON  
*Attorney*  
*National Labor Relations Board*

FEBRUARY 1991



FEB 27 1991

OFFICE OF THE CLERK

⑤  
No. 90-970

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**REPLY TO BRIEF IN OPPOSITION**

ROBERT P. JOY, ESQUIRE  
*Counsel of Record*  
KEITH H. McCOWN, ESQUIRE  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666  
*Counsel for Petitioner,  
Lechmere, Inc.*

## TABLE OF CONTENTS

	Page
I. Denial of the Petition for Writ of Certiorari will Legitimize the Board's Disregard of the <i>Babcock &amp; Wilcox</i> Burden of Proof .....	2
II. The General Counsel has Stretched the Record and the Case Law to Support his Position .....	4

## TABLE OF AUTHORITIES

### Cases:

<i>Jean Country</i> , 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) .....	2
<i>Lechmere, Inc.</i> , 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989) .....	2, 3, 4
<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313 (1st Cir. 1990) ...	4
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) ....	2

### Miscellaneous:

NLRB Casehandling Manual .....	3
--------------------------------	---

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. 90-970

---

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

---

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**REPLY TO BRIEF IN OPPOSITION**

---

Petitioner, Lechmere, Inc. ("Lechmere"), respectfully submits this reply to the brief filed on behalf of the respondent National Labor Relations Board ("NLRB" or "Board") by its General Counsel in opposition to Lechmere's petition for writ of certiorari.



I. DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WILL LEGITIMIZE THE BOARD'S DISREGARD OF THE *Babcock & Wilcox* BURDEN OF PROOF.

The General Counsel unquestionably had the burden of showing that without trespassing on Lechmere's property, the Union had no reasonable alternative means of communicating with its intended audience. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 7 (1988) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113-114 (1956)). The General Counsel's opposition to Lechmere's petition demonstrates that the Board has almost eliminated and in part even shifted this burden of proof in the wake of *Jean Country*. Lechmere respectfully suggests that this is a further reason for this Honorable Court to review the *Jean Country* formula and its application in this case.

First, the opposition demonstrates the Board's endorsement of speculation and unsupported opinion as substitutes for facts in proving whether the Union's message reached Lechmere's employees. On the relative effectiveness of the Union's newspaper advertisements, the General Counsel cites to the Board's "findings" that many employees "may never receive, purchase, or read these local newspapers, or may be exposed to them only occasionally." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 (1989) (emphasis supplied) (Pet. at B-5). The General Counsel's opposition goes further, stating that "there was no showing" that Lechmere's employees received, purchased, or read the newspaper. Opp. at 11.

On the relative effectiveness of tracing license plate numbers to identify employees, the General Counsel cited the Board's "findings" that "employees may use cars registered to others, may car-pool, may walk or take the bus to work, or may not park in the designated employee area." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5-6 (emphasis supplied) (Pet. at B-5).

On the relative effectiveness of handbilling and displaying

signs on the public property near the Lechmere store, the General Counsel cited the Board's "finding" that this was an "ineffective and unsafe locale for union activity." Opp. at 11; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6 (Pet. at B-6). This "finding" was supported by conclusions about the speed of traffic passing by the Lechmere store, the lack of a stop sign or traffic light, the flow of customers during business hours, and a policeman's caution that the union representatives should be careful near the street. *Id.*<sup>1</sup>

These "findings" that the General Counsel met his burden of proof are nothing more than the Board's endorsement of the General Counsel's subjective opinion that these communication methods are ineffective. The Board has broad investigatory powers.<sup>2</sup> To meet its burden of showing that no reasonable alternatives to trespass enabled the Union to reach Lechmere's employees, the General Counsel could have asked employees directly whether the Union's various forms of communication reached them. The Board's approach since *Jean Country* substitutes patronizing speculation and opinion for the actual experiences of employees, virtually eliminating the *Babcock & Wilcox* burden of proof.

In addition, the opposition demonstrates that the Board is inclined even to shift the *Babcock & Wilcox* burden of proof. General Counsel directly suggests that Lechmere failed to "show" that the Union's alternative methods of communication

<sup>1</sup> The Board itself also mischaracterized the public property as a "10-foot-wide strip"; the public strip is actually over 40 feet wide. Pet. at A-3; Opp. at 2.

<sup>2</sup> The NLRB Casehandling manual describes the investigation of an unfair labor practice charge as follows:

It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party. . . . [T]he Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results.

NLRB Casehandling Manual §10056.4.

actually reached the workforce. Opp. at 11 ("there was no showing that [employees] received, purchased, or read this newspaper"). The First Circuit displayed the same incorrect inclination. *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 316 (1st Cir. 1990) (Pet. at A-5) ("there is no particular reason to believe that many of the affected employees actually saw the ads"). Lechmere has no such burden. Instead, it is the General Counsel who must prove that the Union could not reach Lechmere's employees.

This extremely loose approach to an important burden of proof is but another reason to grant Lechmere's petition for writ of certiorari. After *Jean Country* the Board can authorize infringement of private property rights even when a union has in fact reached employees through the available alternatives to trespass.

## II. THE GENERAL COUNSEL HAS STRETCHED THE RECORD AND THE CASE LAW TO SUPPORT HIS POSITION.

This Reply Brief was also motivated by certain unwarranted conclusions in the General Counsel's opposition.

The General Counsel freely referred to Lechmere allegedly censoring the store's newspapers to prevent employees from seeing the Union's advertisements. Opp. at 2, 11 n.4. The First Circuit made similar references. *Lechmere, Inc. v. NLRB*, 914 F.2d at 316 (Pet. at A-5). The Board itself was far less emphatic about this point. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 (Pet. at B-5 n.9). The inference drawn by the General Counsel (and the First Circuit) was that Lechmere's alleged censorship further undercut the efficacy of the Union's newspaper advertisements. Opp. at 11 n.4.

The actual evidence before the Administrative Law Judge was limited to this: the store manager testified that he removed both the union's and competitor stores' ads from those editions of the Hartford Courant delivered to the store. There was no evidence that this took place before employees saw the news-

papers, nor was there evidence of what happened to the ads after they were separated from the rest of the paper. This is a further example of the laxity in the Board's approach to the General Counsel's burden of proof.

The General Counsel also quarrels with Lechmere's point that since *Jean Country*, nearly all accommodation analyses that the Board has performed have resulted in granting union agents access to an employer's property. Opp. at 12 n.5. By citing only two cases in which the Board has denied access (as opposed the thirteen cases cited by Lechmere where access was granted, Pet. at 12-13 n.3) the General Counsel only highlights the reality that *Jean Country* as applied is untrue to the principles of *Babcock & Wilcox*.

Lechmere respectfully requests that its petition for writ of certiorari be granted.

ROBERT P. JOY, ESQUIRE  
*Counsel of Record*  
 KEITH H. McCOWN, ESQUIRE  
 MORGAN, BROWN & JOY  
 One Boston Place  
 Boston, MA 02108  
 (617) 523-6666  
*Counsel for Petitioner,*  
*Lechmere, Inc.*

FEBRUARY 27, 1991

MAY 9 1991

No. 90-970

THE CLERK

IN THE  
**Supreme Court of the United States**  
October Term 1990

LECHMERE, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

On Writ of Certiorari To The  
United States Court of Appeals For the First Circuit

**BRIEF OF NATIONAL RETAIL FEDERATION,  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

John W. Noble, Jr.\*  
Edward B. Miller  
Pope, Ballard, Shepard  
& Fowle, Ltd.  
69 West Washington Street  
Chicago, Illinois 60602-3069  
(312) 214-4200

\*Counsel of Record for *Amicus  
Curiae*, National Retail  
Federation



## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Interest of the Amicus Curiae.....	1
Argument.....	3
A. <i>Jean Country</i> and its Progeny Have Substantially Changed the Law as Established by This Court's Precedent.....	3
B. The NLRB has Attempted, by Fiat, to Create a Separate Rule for Retail Stores....	5
C. The NLRB's Retail Store Cases Represent an Attempt to Resurrect <i>Logan Valley</i> in Contravention of this Court's Decision in <i>Central Hardware Co. v. NLRB</i> .....	12
Conclusion .....	14

## TABLE OF AUTHORITIES

Cases	Page
<i>Amalgamated Food Employees Union v. Logan Valley Plaza</i> , 391 U.S. 308 (1968).....	12, 13
<i>Central Hardware Company v. NLRB</i> , 468 F.2d 252 (8th Cir. 1972).....	10, 11
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972).....	12, 13, 14
<i>Century Markets, Inc.</i> , 296 N.L.R.B. No. 5, 132 L.R.R.M. 1001 (1989).....	7
<i>Dolgin's, a Best Company</i> , 293 N.L.R.B. No. 102, 131 L.R.R.M. 1159 (1989).....	6
<i>Granco, Inc.</i> , 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989).....	6
<i>Jean Country</i> , 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (1988).....	2, 3, 5, 9
<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313, 322 (1st Cir. 1990).....	9
<i>Monogram Models, Inc.</i> , 192 N.L.R.B. 705, 77 L.R.R.M. 1913 (1971).....	4, 10, 11
<i>Mountain Country Food Store, Inc.</i> , 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989).....	6
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956).....	2, 3, 4, 5, 7, 8, 9, 10, 11, 13

	Page
<i>NLRB v. S &amp; H Grossingers's, Inc.</i> , 372 F.2d 26 (2d Cir. 1967).....	9
<i>NLRB v. Lake Superior Lumber Corp.</i> , 167 F.2d 147 (6th Cir. 1948).....	9
<i>NLRB v. Solo Cup Co.</i> , 422 F.2d 1149, 1151 (7th Cir. 1970).....	4
<i>Red Food Stores, Inc.</i> , 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989).....	7
<i>Rockway, a Division of Federated Department Stores</i> , 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989).....	8
<i>Sears, Roebuck &amp; Co. v. Carpenters</i> , 436 U.S. 180 (1977) (n. 41, at 205).....	9, 10, 11
<i>Target Stores</i> , 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989).....	6
<i>Target Stores</i> , 300 N.L.R.B. No. 136, — L.R.R.M. — (1990).....	7, 13
<i>Tecumseh Food Land</i> , 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989).....	8
<i>Wegmans Food Markets, Inc.</i> , 300 N.L.R.B. No. 114 (Dec. 11, 1990) ALJD at 12, slip op.....	11

**Law Review Articles**Page

Note: Employee's Right to Organize — First Circuit Upholds NLRB Order Granting Nonemployee Organizers Access to Retail Store's Parking Lot, 104 Harv. L. Rev. 1407 (1991).....	9
--	---

IN THE  
**Supreme Court of the United States**  
October Term 1990

No. 90-970

LECHMERE, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

On Writ of Certiorari To The  
United States Court of Appeals For the First Circuit

**BRIEF OF NATIONAL RETAIL FEDERATION,  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

This brief is respectfully submitted on behalf of the National Retail Federation (NRF), as *amicus curiae*. Pursuant to Rule 37.3 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Petitioner in this case, and urges that the decision below be reversed.

**I. INTEREST OF THE AMICUS CURIAE**

National Retail Federation (NRF) is the largest national trade association representing the retail industry. Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the new organization



represents fifty state retail associations and twenty-seven national retail associations. In total, NRF represents over one million retail establishments in the United States, which employ nearly sixteen million people.

As a representative of such a large number of retail establishments, NRF is keenly interested in any litigation involving a retail business. The instant case is of particular interest to NRF because a very considerable number of its members own outright or have a valid leasehold interest in parking lots and other premises immediately adjoining their stores. Lechmere, Inc., Petitioner here, like many of NRF's members, since 1982 has prohibited solicitation of any kind on such premises, whether by charities, unions, or any other organizations.

What the National Labor Relations Board has done in this case and, as we will show, in virtually all of the cases following *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (1988) is to invalidate such long-standing no-solicitation rules when they are applied by the retail store to prevent non-employee union organizers from distributing literature and/or picketing on such store-owned premises.

In NRF's view, *Jean Country*'s broad assault on a rule widely applied in the retail industry for many years which prohibits this kind of trespass on store-owned or store-leased premises such as parking lots, is a dramatic departure from this Court's views, and in particular, its long-standing precedent created by the opinion in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

NRF and its members are deeply disturbed by the change which the NLRB's decision in *Jean Country* has wrought, because it substantially dilutes, and threatens to eliminate, the legitimate private property interest which NRF members have

had under the law. This private property interest includes the right to control, in a non-discriminatory manner, the use of its wholly-owned or leased property, and to prohibit its use for unauthorized purposes.

Because of these concerns, NRF urges this court to reverse the decision of the Court of Appeals below.

## II. ARGUMENT

### A. *Jean Country* and its Progeny have Substantially Changed the Law as Established by This Court's Precedent.

In the landmark case of *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), a unanimous court held that an employer may validly post its property against non-employee distribution of literature, where reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. Further, the employer's notice must not discriminate against union access by allowing other types of distribution on the employer's property. *Id.* at 112. In the instant case, it is undisputed that the employer did not allow any other types of distribution.

Other alternative means of communication of the same type available to the union in *Babcock & Wilcox* were available to the union here. It was as true here as in *Babcock & Wilcox* that:

The usual methods of imparting information are available . . . . The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. *Id.* at 113

In this case, as in *Babcock & Wilcox*, the union contacted approximately 20% of the employees through four different

mailings. It made home visits. It placed five advertisements in a daily newspaper in an area where most employees lived. Union organizers stood on the grassy apron bracketing the main entrance to the Petitioner's parking lot and there attempted to distribute handbills to persons who, because of the early pre-store hour, were likely to be employees of Petitioner. Except for a brief interruption, the union was permitted to distribute on the apron because police officers confirmed that the apron was public property on which the union was entitled to carry on this activity.<sup>1</sup>

For almost a month, the union also picketed, stationing its pickets on the grassy apron, and for over six months, intermittent picketing of this type took place. The union also obtained automobile license numbers and, by checking out the ownership of these numbers, it secured the names and addresses of some forty-one of Lechmere's employees. It mailed its literature and authorization cards to these persons. Only one authorization card was signed and returned. Others who received the cards and literature were apparently not interested in returning them.

As pointed out by dissenting Judge Torruella in the Court of Appeals, the facts in this case are very, very similar to those in *Babcock & Wilcox*, with the possible exception that the community in which the store is located is a city larger than the one involved in *Babcock & Wilcox*. The size of the city has been regarded by the NLRB, and at least one Court of Appeals, as not significant. *NLRB v. Solo Cup Co.*, 422 F.2d 1149, 1151 (7th Cir. 1970); *Monogram Models, Inc.*, 192 N.L.R.B. 705, 77 L.R.R.M. 1913 (1971). The mere size of the city of Chicago, (a metropolitan area much larger than the metropolitan area here of Hartford, Connecticut) was, in *Monogram*, not regarded as

<sup>1</sup>Apparently because they did not like being videotaped engaged in such handbilling, the union representatives did not pursue this available means of communication and left the area.

rendering employees' homes inaccessible to union organizers.

Obviously, then, what has happened is that the NLRB has attempted to change the law. The Board has simply failed to apply the precedent of *Babcock & Wilcox* to a factual situation virtually on all fours with that in *Babcock & Wilcox*.

The Board, in decisions following the *Jean Country* case, engages in a semantic exercise, purporting to analyze the relative strengths and weaknesses of the union interest and the interests of the employer. But, we respectfully submit, what the Board has really done is to change its policy, by engaging in *de facto* rule-making, holding that parking lots and other retailer-owned or leased property adjacent to the stores are to be made available to non-employee union organizers, under virtually all circumstances.

#### **B. The NLRB has Attempted, by Fiat, to Create a Separate Rule for Retail Stores.**

In *Jean Country*, the Board decided to temper its application of this court's *Babcock & Wilcox* precedent by undertaking to distinguish among various strengths of rights and interests. It purports to analyze and determine in each case how "strong" is an employer's property interest and how "strong" the union's interest is in disseminating various types of publicity.

Whether a genuine attempt to define and interpret such "strengths" has been successfully accomplished in cases not involving the retail industry we have not explored in detail. However, in retail store situations, an examination of Board decisions reveals that the "analysis" is little more than a recitation of an empty litany, attempting to justify a result which would establish an easement in each and every instance on store-owned or leased parking lots, permitting almost unconditional access by non-employee union representatives.



In each of the following cases, the retailer owned either a fee simple or a lease interest in the parking lot and other adjacent premises. In every instance, the Board held that the employer could not restrict the union's distribution of literature on the store-owned or leased premises, although in each case the employer had appropriately enforced the restriction on like distribution by all others.

In *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989), the union publicity was "area standards" handbilling, protesting the use by the retailer of a non-union maintenance crew to perform painting work.

In *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989), the non-employee union representatives handbilled in support of a strike being conducted by the union at a Coca-Cola bottling plant. The handbills urged consumers to boycott products sold at the store which had been distributed by the struck bottling company.

In *Dolgin's, a Best Company*, 293 N.L.R.B. No. 102, 131 L.R.R.M. 1159 (1989) the non-employee union representative handbilled, protesting the fact that the retailer had engaged to perform store remodeling work by non-union contractors. The handbilling was of the "area wage standards" variety.

In *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989) the handbilling and picketing by non-employee union representatives publicized the union's claim that the store owner had committed and had not yet remedied certain unfair labor practices. The publicity urged consumers not to patronize the store. The union picketed on a public grassy island<sup>2</sup> but did not handbill from the island, allegedly because of safety considerations.

<sup>2</sup>The union had also been permitted by the store owner to picket certain designated areas near the store.

In *Century Markets, Inc.* 296 N.L.R.B. No. 5, 132 L.R.R.M. 1001 (1989), the non-employee union representatives distributed handbills supporting the union's dispute with a meat packing company, asking customers to boycott products made by the struck packing company.<sup>3</sup> Picketing had taken place on public property adjacent to the entrance of the shopping center. Alternative means of communication, including newspaper advertising, direct mail and hand delivery in neighborhoods was, as this court concluded in *Babcock & Wilcox*, "at hand." *Id.* at 113.

In *Target Stores*, 300 N.L.R.B. No. 136, \_\_\_\_ L.R.R.M. \_\_\_\_ (1990), non-employee union representatives were permitted to distribute handbills on store-owned or leased premises at two out of three Target stores. The handbilling was of the "area wage standards" variety, protesting that a general contractor performing remodeling work for Target used non-union carpenter subcontractors.

This undeviating decisional pattern requiring store owners to open their parking lots to non-employee representatives has been subject to exceptions in only three cases which our research has revealed. The circumstances in each were rare and unusual.

In *Target Stores*, (300 N.L.R.B. No. 136, \_\_\_\_ L.R.R.M. \_\_\_\_ (1990), Target was permitted to prohibit handbilling on leased premises at the third of three Target stores because there was available to the union a large public grassy area conveniently located near the entrance through which most Target shoppers passed.

In *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989) the employer's prohibition of "area standards" picketing and handbilling was found not violative of the Act

<sup>3</sup>The respondent had allowed the Salvation Army to solicit funds during the holiday season, but this was found by the Board not to have been a significant dilution of respondent's property interest.



because the union representative who organized the picketing and handbilling admitted that he was totally unaware of what wages and benefits were in fact enjoyed by the employees of the store, and had no idea whether they were comparable to area standards. In addition, the second purpose of the picketing there was to protest the store's foreign ownership. This, the Administrative Law Judge found to be an "appeal to nativistic prejudice" and against public policy. While the Board did not affirm his public policy finding, it was careful to make note of the fact that picketing and handbilling for that purpose was not activity protected by the Act.

In another exceptional set of circumstances, a retailer owner was justified in prohibiting handbilling on property owned by the store, *Rockway, a Division of Federated Department Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989). The "area standards" handbilling protested the use of non-union contractors at a location where construction work was no longer occurring. The Board found it unnecessary to decide whether such handbilling was for an unlawful "hot cargo" purpose but held that the union's rights were "weak."<sup>4</sup>

These cases conclusively demonstrate that the Board has isolated retail facilities from *Babcock & Wilcox* criteria, and is instead, with very rare exceptions, requiring retailers to make their owned or leased parking lots available to non-employee representatives for all commonly used types of handbilling and

<sup>4</sup>In *Tecumseh Food Land*, 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989), a store owner was found justified in restricting, but not prohibiting, the union's activities. The owner prohibited the union from having gatherings of five people in a small area immediately adjacent to the store's entrance and from impeding the flow of traffic by stationing a handbiller in the center of the respondent's driveway. Otherwise the owner had permitted the union representatives to park their cars on the store's parking lot which was normally restricted to use by customers. This case is in substantial degree inapposite. We include it only in the interest of completeness.

picketing. Any analysis of the "strengths" of the union interests, based on the *objectives* of the distributions may fairly be described as superficial, if not a sham rhetorical exercise.

The inherent fault in *Jean Country* and its progeny is the Board's departure from *Babcock's* "reasonable alternative means" test as the preeminent factor envisioned by the *Babcock* court. Instead, the measure has become but one consideration to be weighed in the "aggregate" with Section 7 and property rights.<sup>5</sup> The result is not the unambiguous and relatively objective measurement of *Babcock* but the unclear subjective test of *Jean Country* and *Lechmere*.<sup>6</sup>

The Board has ceased to follow the *Babcock & Wilcox* precedent pursuant to which, as this Court observed in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977), (n. 41 at 205):

In the absence of discrimination, the union's asserted right of access for organizational activity had generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees. *NLRB v. S & H Greening's, Inc.*, 372 F.2d 26 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948).

Neither in the instant case nor in any of the above decisions can there fairly be said to exist the "unique obstacles to nontrespassory methods of communication" present in the cases

<sup>5</sup>*Lechmere*, 914 F.2d 313, 322.

<sup>6</sup>*Lechmere's* balancing not only undermines the substance of the accommodation in *Babcock* but also robs the threshold test of its primary procedural advantage: certain and predictable outcomes. *Lechmere* plunges the Board in its initial inquiry into an inherently subjective weighing of competing rights with few, if any, constant guidelines. Note: Employees' Right to Organize — First Circuit Upholds NLRB Order Granting Nonemployee Organizers Access to Retail Store's Parking Lot, 104 Harv. L. Rev. 1407, 1414 (1991).

cited in the *Sears* footnote. Instead, in all these cases, as in *Babcock & Wilcox*, the various instruments of publicity were "at hand." Unions, however, naturally preferred to use the parking lots owned by retail stores, because they are the most convenient means with which to contact both customers and employees. But, we respectfully submit, it was not the purpose of this Court in *Babcock & Wilcox*, to require retailers to provide non-employee representatives the *most convenient* or the *most effective* means of communication with a retailer's customer or employees.

The Court of Appeals for the Eighth Circuit concluded, on remand, in *Central Hardware Company v. NLRB*, 468 F.2d 252 (1972):

Doubtless, solicitation on the parking lot was an easier approach to the employees than some of the other recognized means of union solicitation. However, this falls far short of meeting the union's burden of establishing that no reasonable means of communication with the employees existed other than solicitation on the parking lot. *Id.*; 255-6.

And as the NLRB said in *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706:

We do not believe it wise or proper to adopt a "big city rule" and a different "smalltown rule" in applying *Babcock & Wilcox*, or to attempt to determine how big a city must be to justify the proposed differing application. Concededly, it may be more convenient and less expensive for the union to use the respondent's property for the purpose of organizing the employees here involved. That was also true under the facts of *Babcock & Wilcox*. But the test established

there was not one of relative convenience, but rather whether the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them . . . .<sup>7</sup>

These observations were quoted by the Court of Appeals in *Central Hardware v. N.L.R.B.*, 468 F.2d 252, 254 (8th Cir. 1972).

This Court specifically recognized in *Babcock & Wilcox*, that non-employee union representatives "would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. There, as here, it would have been obviously more convenient for the union representatives if they were allowed to use the employer's property. That was not the test applied in *Babcock & Wilcox*.

It appears, however, to be the test adopted and currently applied by the NLRB, at least with respect to parking lots and other premises owned by retail stores. It has substituted the obverse doctrine that, except in very unique cases, retailers must open their property to non-employer union representatives.<sup>8</sup> That is precisely the opposite of the *Babcock* rule, described in *Sears* as one restricting such permission to circumstance demonstrating truly unique obstacles to non-trespassory methods of communication.

We respectfully submit that the Board should not be

<sup>7</sup>It is also interesting to note that in the *Monogram Models* case, as in the instant case, the employer had refused to furnish the union with a list of employees' names and addresses. That was found to be of no significance by the Board. 192 N.L.R.B. 705, 706-707.

<sup>8</sup>This obverse doctrine was explicitly stated by an Administrative Law Judge whose decision was recently affirmed by the Board. *Wegmans Food Markets, Inc.*, 300 N.L.R.B. No. 114 (Dec. 11, 1990) ALJD at 12, slip op.



allowed to change the law as laid down in this Court's precedents, at least in the absence of substantial operational changes that may have developed in the industry. We see no reference in any of the recent Board decisions to any such alleged changes in the operations of the retail industry.

**C. The NLRB's Retail Store Cases Represent an Attempt to Resurrect *Logan Valley* in Contravention of this Court's Decision in *Central Hardware Co. v. N.L.R.B.***

When one examines the retail store cases to which we have referred in this brief, it is hard to avoid the conclusion that what the Board is really doing is to again raise the ghost of *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) by applying *Logan Valley* principles to retail store NLRB cases. But this court made clear on the occasion of the Board's previous attempt, in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972) that this was not permissible. This court spoke:

The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case. *Id.* at 547.

Despite this clear holding, the NLRB, in its decision here, 295 NLRB No. 15, slip op. p. 4, 131 L.R.R.M. 1480, continues to utilize the prohibited consideration, stating "We conclude that the Respondent's property right at issue is relatively substantial but note that the parking lots are essentially open to the public."

Although always reciting the litany of an alleged comparison of the relative strengths of employers' and employees' (only derivatively, union) rights, the fact is that the NLRB has, in effect, adopted a *per se* rule pursuant to which retail stores are obligated to permit non-employee union representatives access to their parking lots and other employer-owned or leased premises adjacent to the stores. In doing so, the Board has regularly followed a *Logan Valley* type of analysis. It adopts fault-ridden reasoning such as the following:

The record disclosed that the shopping center is open to anyone who wants to enter and in fact the public is so invited. Target does not permit pedestrians from cutting across its property. While Target maintains and enforces a no-solicitation, no-distribution rule, a factor strengthening its property interest, the strength of that interest becomes less compelling when noting otherwise the open and public nature of that business property. *Target Stores*, 300 N.L.R.B. No. 136, at page 16 of the Slip Opinion.

We respectfully submit that this ill-concealed attempt on the part of the Board to resurrect the *Logan Valley* concept and its failure to apply *Babcock & Wilcox* principles to retail stores needs, once more, to be rejected by this Court. One would have thought that this Court's decision in *Central Hardware* made that rejection plain for all to see. The Board seems not



to have seen it. The principles of this Court's *Central Hardware* decision appear to require reaffirmation and warrant a reversal of the decisions of the NLRB and the First Circuit here.

### CONCLUSION

For the reasons set forth above, the National Retail Federation, as Amicus Curiae, supports the position of Petitioner set forth in its Brief on Writ of Certiorari, and respectfully submits that this Court should reverse the decision of the Court below.

Respectfully submitted,

John W. Noble, Jr.\*  
Edward B. Miller  
Pope, Ballard, Shepard  
& Fowle, Ltd.  
69 West Washington Street  
Chicago, Illinois 60602-3069  
(312) 214-4200

\*Counsel of Record for *Amicus Curiae*, National Retail Federation

May 9, 1991

④  
No. 90-970

Supreme Court, U.S.  
FILED

FEB 15 1991

OFFICE OF THE CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1990

LECHMERE, INC.,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR  
LAW EQUALITY IN SUPPORT OF PETITIONER

GERARD C. SMETANA\*  
RICHMAN, LAWRENCE,  
MANN, GREENE &  
SMETANA  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 855-0300

*Of Counsel:*

MICHAEL E. AVAKIAN  
RICHMAN, LAWRENCE, MANN  
GREENE & SMETANA  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 659-8687

Attorneys for *Amicus Curiae*  
Council on Labor Law Equality  
\**Counsel of Record*

## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
ISSUE PRESENTED .....	3
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
I. THE BOARD'S APPLICATION OF ITS <i>JEAN COUNTRY</i> ANALYSIS DOES NOT COMPORT WITH ITS HEADY LANGUAGE THAT IT FULLY CONSIDERS AN EMPLOYER'S PROPERTY INTEREST AS FUNDAMENTAL UNDER <i>BABCOCK &amp; WILCOX</i> , OF WHICH IT MISCONCEIVES .....	4
II. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY DRAW THE LINE FOR THE BOARD IN WHAT CIRCUMSTANCES THE BOARD IS EMPOWERED TO ORDER AN EMPLOYER TO PERMIT THE TRESPASS OF NON-EMPLOYEES UPON ITS PROPERTY, A REPEATED ISSUE OF IMPORTANCE UNDER THE ACT WHICH WILL OTHERWISE EVADE REVIEW .....	10
III. A DIRECT SERVITUDE ON AN EMPLOYER'S PROPERTY WITHOUT ANY CONSIDERATION BY THE BOARD THAT THE INTRUSION AUTHORIZED FOR UNION OFFICIALS IS CONTRARY TO THIS	



COURT'S PRIOR ADMONITIONS AND DEPRIVATION OF FREE SPEECH AND PROPERTY IS BEYOND THE BOARD'S JURISDICTION .....	14
CONCLUSION .....	20

## TABLE OF AUTHORITIES

CASES	Page
<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)</i>	3, 12
<i>Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)</i>	18
<i>Butterfield Theatres, 292 N.L.R.B. No. 8, 130 L.R.R.M. 1113 (1988)</i>	6
<i>Central Hardware Co. v. NLRB, 407 U.S. 539 (1972)</i>	2, 11
<i>D'Alessandro, Inc., 292 N.L.R.B. No. 27, 130 L.R.R.M. 1089 (1988)</i>	6
<i>Dolgins, 293 N.L.R.B. No. 102, 2131 L.R.R.M. 1159 (1989)</i>	6
<i>Federated Dept. Stores, 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989)</i>	9
<i>Granco, Inc., 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989)</i>	6
<i>Hardees Food Systems, 294 N.L.R.B. No. 48, 131 L.R.R.M. 1345 (1989)</i>	9
<i>Jean Country, 291 N.L.R.B. No. 4 (1988)</i>	passim
<i>Kaiser Aetna v. United States, 444 U.S. 164 (1979)</i>	13, 14

TABLE OF AUTHORITIES - CONTINUED

	<i>Page</i>
<i>Karatjas Family Lockport Corp.,</i> 292 N.L.R.B. No. 92, 130 L.R.R.M. 1289 (1989)	6
<i>Little &amp; Co.,</i> 296 N.L.R.B. No. 89, 132 L.R.R.M. 1173 (1989)	6
<i>Lloyd Corp., Ltd. v. Tanner,</i> 407 U.S. 551 (1972)	2, 8
<i>Loretto v. Teleprompter Manhattan CATV Corp.,</i> 458 U.S. 419 (1982)	13, 15
<i>Montgomery Ward &amp; Co.,</i> 288 N.L.R.B. 126 (1988)	6
<i>Mountain Country Food Store,</i> 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989)	6
<i>NLRB v. Babcock &amp; Wilcox,</i> 351 U.S. 105 (1956)	2, 5, 10, 11
<i>NLRB v. Southern Maryland Hospital Center,</i> 135 L.R.R.M. 2693 (4th Cir. 1990)	2, 8, 9
<i>Red Food Stores,</i> 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989)	6
<i>Sahara Tahoe Hotel,</i> 292 N.L.R.B. No. 86, 131 L.R.R.M. 1021 (1989)	6
<i>Scott Hudgens v. NLRB,</i> 424 U.S. 507 (1976)	2, 11, 12, 13

TABLE OF AUTHORITIES - CONTINUED

	<i>Page</i>
<i>Sears, Roebuck &amp; Co. v.</i> <i>San Diego County Dist. of Carpenters,</i> 436 U.S. 180 (1978)	6, 7
<i>Sentry Markets, Inc. v. N.L.R.B.,</i> 914, F.2d 113 (7th Cir. 1990)	9
<i>Southern Maryland Hosp. Ctr.,</i> 293 N.L.R.B. No. 136 (1989)	8
<i>Sparks Nugget, Inc.,</i> 298 N.L.R.B. No. 69, 134 L.R.R.M. 1121 (1990)	7, 8
<i>Target Stores,</i> 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989)	6
<i>Tecumseh Foodland,</i> 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989)	9
<i>Wooley v. Maynard,</i> 430 U.S. 705 (1977)	4, 17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

---

LECHMERE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

---

**BRIEF OF AMICUS CURIAE COUNCIL ON  
LABOR LAW EQUALITY IN SUPPORT  
OF GRANTING PETITION FOR WRIT OF CERTIORARI**

**INTEREST OF AMICUS CURIAE**

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board, related developments under the National Labor Relations Act, and to provide support to employer interests on those issues which affect a broad section of industry. COLLE's formation recognizes the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

In the instant case, the National Labor Relations Board entered an order fundamentally altering the expectation of exclusive use of an employer's property by ordering that non-employees be allowed to trespass on business property for non-business related purposes, thereby infringing not only upon an employer's two-dimensional (land and space) interest in preserving and protecting its property for its exclusive use, but affecting its business property interests in providing an economically attractive environment for its prospective patrons, ensuring for those



patrons a pleasing environment free from peddlers and other solicitors, protecting its own Free Speech rights, and ensuring its right to do business without direct interference.

The manner in which the legal issues under review are resolved by the Court is extremely important to employers throughout the nation. The Board's decision calls into question one of the principle features of the National Labor Relations Act ("NLRA") that is designed to foster and protect employees' freedom of choice. However, the Court of Appeals' reliance upon *Jean Country*, 291 N.L.R.B. No. 4 (1988), emasculates an employer's property interest and sweeps aside 35 years of caselaw originating from the Court that has articulated the importance of employer property interests beginning with *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), and *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

The decision below is a departure from the Court's prior decisions, misreads these decisions, and permits the Board to apply what on its face may appear to be a permissible application under the NLRA, but actually is operationally applied to ignore the Court's holding in *Babcock & Wilcox*. Once again "the Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees." *Babcock & Wilcox, Co.*, 351 U.S. at 113.

In *NLRB v. Southern Maryland Hospital Center*, 135 L.R.-R.M. (BNA) 2693, 2697 (4th Cir. 1990), the Fourth Circuit recently rejected the similar attempt by the Board to allow organizational activities of nonemployees upon its property when alternative means of communication are available. Hence we believe not only is the instant case ripe for review, but that a writ of certiorari is warranted due to an important diversity of opinion in the circuits.

For these reasons, it is within the interest of employers to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures

sufficient to permit informed judicial review. Moreover, it has become painfully clear that it is too expensive for employer's to repeatedly challenge Board findings in the appellate courts when the deference given to the Board is so high. Hence, few cases will ever reach this Court for reconsideration by employers on principle alone.

The parties have thus far primarily focused on issues involving judicial review of administrative decisions and the power of the Board to amend its interpretation of the statute. However, COLLE believes that the issue presented in this case includes not only whether the Board's *Jean Country* analysis is the correct test, but whether as applied, *Jean Country* is manifestly inconsistent with *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*.

COLLE is therefore properly concerned that if this Court does not hear this case, employer's will no longer be able to prevent consumer product picketing, area standards picketing or even war protests upon its property, for the Board's implementation of the *Jean Country* decision is the resurrection of the Court's now rejected functionality analysis in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

COLLE thus brings to this case a diverse perspective not presently represented. Therefore, COLLE's participation may assist the Court in obtaining full consideration of the public-interest issues.

### ISSUE PRESENTED

Whether the court of appeals properly decided that the Board's determination that nonemployee organizational interests were superior to an employer's property interests in protecting its property and business, where the employer has articulated a non-discriminatory non-solicitation policy and where the Board found that the union had available alternative means of communication with petitioner Lechmere's employees, but that those means had not been effective enough, is substantially justified.

## SUMMARY OF ARGUMENT

The Court's seminal decision in *Babcock & Wilcox* articulated the plain legal fact that an employer's right to be free from interferences upon his property must be respected unless the Section 7 right of employees established by Congress cannot be met by alternative means of communication. The issue was framed by the Court in terms of the *availability* of alternative means of union communication with employees, not whether those available means are *effective* or *not effective enough*, as used in the contemporary parlance of the Board. The balance between alternatives has always been used in constitutional analysis, not "effectiveness."

Since the right to property protected by the Fifth Amendment is constructed of a "bundle of rights" including the right to speak and to refrain from speaking, *Wooley v. Maynard*, 430 U.S. 705 (1977), the Board's complete failure to consider what a property right is when it is presented with questions concerning union access upon an employer's property, violates due process. In *Jean Country*, 291 N.L.R.B. No. 4 (1988), the Board alleges that it will follow the Court's decisions, but then adds to the language the "effectiveness" of communications test which the Court nowhere articulated. Furthermore, the Board has applied its *Jean Country* test in a wholesale manner to allow union access to employer property on the most minimal of union proof whenever the Board believes that *more effective* means are available. This construct of its jurisdiction is an abuse of discretion which should not require Court supervision every decade.

## ARGUMENT

### I. THE BOARD'S APPLICATION OF ITS *JEAN COUNTRY* ANALYSIS DOES NOT COMPORT WITH ITS HEADY LANGUAGE THAT IT FULLY CONSIDERS AN EMPLOYER'S PROPERTY INTEREST AS FUNDAMENTAL UNDER *BABCOCK & WILCOX*, OF WHICH IT MISCONCEIVES

The Board's decision in *Jean Country* emasculates the Court's decisions in *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*. In each of these cases, the Court repudiated the Board's attempt to allow intrusions onto private property. The Board's language in *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988), attempts to meet the Court's concerns. However, the result is the application of the Board's worn-out predilection for interfering with property rights. As a governmental agency, it is estopped from engaging in activity stripping fundamental rights of their essential character.

*Amicus* respectfully calls to the attention of the Court several cases in which the "accommodation" of Section 7 and property interests have turned. These cases demonstrate that the Board's *Jean Country* "test" is used in a fashion nowhere meeting the substantial burden established by the Court as necessary to breach an employer's property rights. We show these cases to urge the Court to review the instant case in light of the Board's nationwide abuse of its authority.

In *Jean Country*, the Board correctly observed that the rule in *Babcock & Wilcox* was that alternative means "must 'always' be considered" before the property right could yield to union access. 129 L.R.R.M. (BNA) at 1203. However, the Board reads the Court's concept that the employer can prevent access if "other available channels of communication" exist to the union, except where "the inaccessibility of employees makes ineffective the reasonable attempts to communicate," 351 U.S. at 112, to mean that access is permissible where there is "no reasonable alternative means" for the union to communicate. 129 L.R.R.M. (BNA) at 1203 (emphasis in original). "Inaccessibility" has been interpreted by the Board to mean "unavailable in the circumstances" rather than in its location sense used in *Babcock & Wilcox*. *Id.* at 1204.

The so-called "spectrum" of rights suggested in *Scott Hudgens*, was then swallowed by the Board: "we view the consideration of the availability of reasonably *effective* alternative means as especially significant in this balancing process." *Jean Country*,



129 L.R.R.M. (BNA) at 1205. Hence, to the Board, the cornerstone of the Court's repeated rulings turns not on whether other means are available to the union, *but whether the union was successful* ("effective") in conveying its message. This is not the property right balancing envisioned by the Court which must occur, since the LMRA specifically preserves the First Amendment right of employers in Section 8(c).

The Board's cases fall into two categories. First, where the *Jean Country* test is mouthed and the Board promptly finds that even in the presence of a substantial property interest the unions 'cannot communicate *effectively* unless it is right outside the employer's door.<sup>1</sup> Second, the Board will find that the nonsolicitation policy was not being enforced by the employer in every

---

<sup>1</sup>*Dolgin's*, 293 N.L.R.B. No. 102, 2131 L.R.R.M. (BNA) 1159, 1162 (1989) (area standards handbilling ordered on company property because union could not distinguish between customers, "thereby reducing the effectiveness of the handbilling"); *Butterfield Theatres*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113, 1116 (1988) (picketing at parking lot entrance simply "ineffective and/or unsafe"); *Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989) (union agent testifies that area standards picketing at perimeter less effective than at the front door; Board finds this "not effective alternative"); *Sahara Tahoe Hotel*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021, 1024 (1989) (parking lot picketing necessary because home visits, radio, advertisements, newspapers, magazines, cab ads, and billboards not a "reasonable effective means to communicate"); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331, 1333 (1989) (where nondiscriminatory access rule in place - area standards picketing at lot entrance found "generally ineffective" because it would "substantially dilute" union message); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325, 1327 (1989) (ULP picketing at edge of parking lot not "reasonable effective alternative means of communication"); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) (picketing on 14th floor of office building necessary because union alleged it could not as effectively communicate outside of building entrance); *Mountain Country Food Store*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329, 1330 (1989) (shopping center with three shops - because union product boycott message could not fit on one picket sign, picketing at parking lot entrance "was ineffective").

case against prospective solicitors.<sup>2</sup> Both situations, reflected in the cases below, highlight the fact that the Board's ruling will improperly turn on a standardless consideration of what a property right is.

This lack of commitment to the Court's prior decisions is reflected in the lack of full consideration of *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), where the Court upheld state jurisdiction of trespass by union area standards picketers. In that case, the Court reviewed its *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware* decisions in reexplaining that:

the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a *heavy one* is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has *rarely been in favor of trespassory organizational activity*.

*Sears*, 436 U.S. at 205 (emphasis added).

The Court also noted that access "has generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees," *Id.* at 205 n.41, and that "[o]f course, if *Sears* had initiated the proceeding before the Board, the location of the picketing would have been entirely

---

<sup>2</sup>*Karatjas Family Lockport Corp.*, 292 N.L.R.B. No. 92, 130 L.R.R.M. (BNA) 1289, 1291 (1989) (because employer allowed charity and civic use of property, union access required); *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 127 (1988) (restaurant could not exclude union agents where other businesses allowed); *D'Alessandro, Inc.*, 292 N.L.R.B. No. 27, 130 L.R.R.M. (BNA) 1089 (1988) (Board overrules ALJ and finds shopping center access was discriminatory to unions).



irrelevant and no question of accommodation would have arisen." *Id.* at 201 n.32. This interpretation of the employer's right to protect his property by keeping off area standards picketers and even non-employee organizers is totally inconsistent with the Board's *Jean County* jurisprudence set forth above and reflected in the two decisions set out below.<sup>3</sup>

In *Sparks Nugget, Inc.*, 298 N.L.R.B. No.69, 134 L.R.R.M. (BNA) 1121 (1990), the Board ordered the employer to allow handbillers and picketers access to its property to communicate to customers entering through a private rear entrance: "BOYCOTT THE SPARKS NUGGET." The union did also picket at the front entrance, but because "the Section 7 activity [at the rear entrance] in question would be conducted no closer than approximately 40-50 yards from its intended audience...the effectiveness of the Union's message in terms of both its substantive impact and the number of customers potentially reached via picketing or handbilling would be substantially diluted, if not defeated, if this message were required to be conveyed to its audience only from the relatively remote alternative location." *Id.* at 1130. The only suggestion by the Board of balancing the employer's property interest was that "the public is extended a broad invitation - indeed, it is presumably encouraged - to come on to the respondent's property," and that the record did not show customers "would be significantly obstructed or interfered with by the presence of picketers or handbillers." *Id.*<sup>4</sup> This so-called *balance* emasculates every known form of protection given by the Court to property owners. The Board wrongfully consid-

---

<sup>3</sup>The Court in *Sears*, 436 U.S. at 200 n.31 (emphasis added), explained that "in deciding the unfair labor practice question, the Board's sole concern would have been the objective, *not the location*, of the challenged picketing. Hence, the Court has always envisioned that private property were almost fully inviolate unless the union is presented with "unique obstacles" to communication. *Id.* at 205 n.41.

<sup>4</sup>In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) the Court affirmed that property does not "lose its private character merely because the public is generally invited to use it for designated purposes."

ers the content of the union's speech and the effectiveness of its communication, just as it did to petitioner Lechmere.

The *Sparks Nugget, Inc.* position is consistent with the Board's other rulings, such as in *Southern Maryland Hosp. Ctr.*, 293 N.L.R.B. No. 136 (1989), *rev'd in part and aff'd in part*, *NLRB v. Maryland Hosp. Ctr.*, 135 L.R.R.M. (BNA) 2693 (4th Cir. 1990). In *Southern Maryland Hosp.*, the Board granted cafeteria access to union officials despite the hospital's nonemployee access policy. The Fourth Circuit found that the Board had deviated far afield of the holding in *Babcock & Wilcox*. In the court's view the "ultimate question...is not whether organizational contact of employees is difficult but whether the difficulty can be reasonably overcome." *Id.* at 2697 (quoting *Hutzler Bros. Co. v. NLRB*, 630 F.2d 1012, 1017 (4th Cir. 1980)). The Fourth Circuit found the Board had "incorrectly utilized *Babcock & Wilcox*...consistent with other Board decisions that have declined to apply the *Babcock & Wilcox* test." *Id.* at 2698. The court rejected the Board's conclusion in the absence of evidence that the employer's policy was discrimin.

The contrast is especially poignant in the recent Seventh Circuit decision in *Sentry Markets, Inc. v. NLRB*, 914 F.2d 113, 115 (7th Cir. 1990), where the court upheld union access to permit struck product handbilling on company property of the non-primary employer rather than on the street. This was permitted by the Court even though "[t]he Board used no analysis in coming to this conclusion...." (emphasis added). The Board had rejected normal communicative measures such as advertising, letters, and telephone solicitation as "ineffective, unsafe or too expensive." *Id.* at 117.<sup>5</sup>

---

<sup>5</sup>The Seventh Circuit made no mention of what Sentry Market's property interests were at all because "none of the parties challenge the Board's characterization of Sentry's property right in this case" as weak. 914 F.2d at 115.

Accordingly, the Board's interpretation in *Jean Country* is at odds with this Court's prior rulings.<sup>6</sup> It admits to balancing of property rights and speech based upon content and effectiveness which are impermissible under the First Amendment to the United States Constitution. For these reasons, a writ of certiorari should be issued to consider the Board's jurisdiction here.

**II. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY DRAW THE LINE FOR THE BOARD IN WHAT CIRCUMSTANCES THE BOARD IS EMPOWERED TO ORDER AN EMPLOYER TO PERMIT THE TRESPASS OF NON-EMPLOYEES UPON ITS PROPERTY, A REPEATED ISSUE OF IMPORTANCE UNDER THE ACT WHICH WILL OTHERWISE EVADE REVIEW**

It is the position of *amicus curiae* that the position of the Board in *Jean Country* has and will continue to manifest itself in a manner which violates the intent of this Court in *Babcock & Wilcox*, 351 U.S. 105 (1956). *Amicus* recognizes that since the right to organize is at issue in this case, which may be the most important statutory right of all under the Act, if the Board is permitted the authority here, then it will be permitted that authority in other cases as well. This is because the Board's adoption of balancing rights upon a continuum will allow it to place the fulcrum wherever it may. But this analysis has never

---

<sup>6</sup>Our research shows that the only limitation on the Board's otherwise 100% allowance of union access on an employer's property occurred where either the target for which there picketing is no longer present, *Federated Dep't Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. (BNA) 1362 (1989) (no access where union attempts area standards pickets after the store is built); *Hardees Food Systems*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989) (no access where union has no Section 7 interest at all), or the union wants to block customer access: *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989) (on one store-one lot situation, union could not picket directly in front of store door, but could in the parking lot) (Member Cracraft; dissenting).

been utilized by the Board before and is not a means to assess property rights in a meaningful way.

An employer's interest in protecting its property was first protected from the Board's authority in *Babcock & Wilcox Co. v. NLRB*. There, as here, non-employee organizers were permitted by the Board to engage in activities upon the employer's property, even in the face of a nondiscriminatory no solicitation policy. *Id.* at 107. It was the Board's position that unless access was ordered, "union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. This position was rejected by the Court. It ruled that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distributions. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." *Id.* at 112. The possibility of access was left open by the Court "when the inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels...." *Id.*<sup>7</sup>

---

<sup>7</sup>It is clear that the "inaccessibility" the Court had in mind, was the availability of alternate means of communication, and not whether the means themselves were effective. In *Scott Hudgens v. NLRB*, 424 U.S. at 534, the dissent by Justice Marshall highlighted the fact that "*Babcock & Wilcox* did not require resort to the mass media," by explaining in his footnote 6 that "[t]he only alternative means of communication referred to in *Babcock & Wilcox* were 'personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees,'" (quoting *Babcock & Wilcox*, 351 U.S. at 111). Since the availability of those methods existed in that case, the Court determined that the employer's property right cannot be invaded when those methods are available to the union. Furthermore, the dissent's suggestion that *Hudgens'* demonstration of available union alternatives "are considerably more expensive," not as "likely to be effective as on-location picketing," and "inadequate" were rejected by the



Moreover, the distinction between access of employees and nonemployees is substantive. "No obligation is owed nonemployee organizers." *Babcock & Wilcox*, 351 U.S. at 113.<sup>8</sup> Accordingly, the Court told the Board it would accept an intrusion only "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* The Court never stated that the test was whether the union *effectively* reached their targets, but whether the union had *reasonable* means of doing so.

Sixteen years later, in *Central Hardware Co. NLRB*, 407 U.S. 539 (1972), the Court again reviewed an employer's property interests in a situation similar to *Lechmere*. In *Central Hardware*, the store was surrounded on three sides by a parking lot where the union nonemployee organizers solicited Central's workers. Because of complaints, Central enforced its nonsolicitation rule and at least one organizer was arrested for trespassing on the company's property. *Id.* at 541. This time, the Board held the company's no solicitation rule was "overly broad." Based upon the Court's decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ("*Logan Valley*"), the Eighth Circuit enforced the Board's Order, which this Court then concluded did not apply. The Court reiterated that in *Babcock & Wilcox*, the Board's imposition of a servitude on the employer's property was improper because "the availability of alternative channels of communication made the intrusion on the employer's property rights ordered by the Board unwarranted." *Id.* at 544. Furthermore, the accommodation principle articulated in *Babcock & Wilcox* was required "only in the context of an organization campaign." *Id.* at 544-45.

---

Court majority. *Id.* at 533-34. Yet, the dissent's reading was adopted by the Board in *Jean Country*.

<sup>8</sup>See *Scott Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (different balance struck when persons are employees already on the employer's property).

The Board's error in *Central Hardware* was finding that because the employer allowed the public onto its property, this "diluted" the employer's interest. The Court strongly disagreed: "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Id.* at 547. Since this fact was the only one relied upon by the Board, in misreading *Logan Valley*, the Court found the Board's order "an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* The case was allowed to be remanded for the Board to consider the question whether any reasonable means to communicate with the workers was available "other than solicitation in Central's parking lots." *Id.*

Four years later, the Court was imposed upon to revisit its rulings. In *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), union picketers were removed from a shopping mall owned by Hudgens, in which one store the union had a primary dispute. The Board found an unfair labor practice upon the conclusion that members of the public were invited to do business within the mall and therefore it was "immaterial whether or not there existed alternative means of communicating with the customers and employees of the Butler store." *Id.* at 511. Demonstrating that unlike *Babcock & Wilcox* and *Central Hardware*, the activity in Hudgens involved "economic strike activity," carried out by Butler's own workers, but trespassing upon the property interests of Hudgens, the Court refused to allow the Board to draw the line upon the existence alone of section 7 activity.<sup>9</sup> Hence, the line drawn "along the spectrum" between the LMRA right and

---

<sup>9</sup>In distinguishing its decision in *Logan Valley*, the Court showed that there, in contrast to the hand-billing in *Lloyd*, "the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had no other reasonable opportunity to reach their intended audience." *Hudgens*, 424 U.S. at 517-18. "[T]he ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*." *Id.* at 518.



the property right required the Court to vacate the Board's opinion and remand for this inquiry of accommodating the section 7 and the property rights.

As represented in the case at bar, the Board has not followed the Court's *Scott Hudgens* analysis. Whether the Court believes the balance was properly struck by the Board in this case or not, certiorari should be granted to resolve this important question with which the circuit courts of appeal are in disagreement.

**III. A DIRECT SERVITUDE ON AN EMPLOYER'S PROPERTY WITHOUT ANY CONSIDERATION BY THE BOARD THAT THE INTRUSION AUTHORIZED FOR UNION OFFICIALS IS CONTRARY TO THIS COURT'S PRIOR ADMONITIONS AND DEPRIVATION OF FREE SPEECH AND PROPERTY IS BEYOND THE BOARD'S JURISDICTION**

It is beyond cavil that a landowner's right to exclude persons from his property is fundamental to the constitutional interest in and protection of private property. In situations where the government permits the invasion or intrusion upon private property, this Court has repeatedly held that the Fifth Amendment prohibits that exercise of authority without the payment of just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

In *Kaiser Aetna*, the Corps of Engineers sought public access to an improved private marina under the River and Harbors Act. The Court found that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-80. The Court rejected the argument that the regulatory action taken by the Corps was

insubstantial, because it "result[s] in an actual physical invasion of the privately owned marina." *Id.* at 180. Furthermore, the Court disclosed the extent to which the interest in excluding others is firmly anchored in the property right: "And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.*<sup>10</sup>

The difficulty with the Board's approach to private property in the instant case is that it fails to ever acknowledge what the right is constructed of. As the Court set forth in *Kaiser Aetna*, *supra*, the ownership of property entails a "bundle of rights." The Board however, refers to the right of property solely in an ownership context. This limitation was soundly rejected by the Court in *Loretto*, *supra*. In that case, the City of New York granted an easement for the local cable television company to install boxes and wires on every building in the city. The Court reiterated its consistently held view that although the government may regulate the use to which property may be put, a "taking" occurs where a physical invasion is granted. *Id.* at 430. In the context of limited permanent invasions, the Court held that "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land," the action is unlawful. *Id.*

In arriving at these conclusions, the Court has shown that "several factors are particularly significant-the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Loretto*, 458 U.S. at 432. In reviewing the application of the "easement of passage" involved in *Kaiser Aetna*, the Court in *Loretto* emphasized that although the matter involving the marina, "not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that

---

<sup>10</sup>The Corps had argued that "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property-the right to exclude others," by opening up its private pond to the ocean. *Kaiser Aetna*, 444 U.S. at 176.

physical invasion is a government intrusion of an unusually serious character." *Id.* at 433.

The Board has never undertaken to apply any proper balance between what may allegedly be called a temporary taking or limitation on the right of an owner to exclude certain persons to further his purpose to "obtain a profit" from his property in furtherance of its Fifth Amendment right to do business.<sup>11</sup> To date, this Court has allowed only a limited invasion of a shopping center parking lot under circumstances where the owner "had not exhibited an interest in excluding all persons from his property... - [which] 'cannot be viewed as determinative' [in other situations]." *Id.* at 434 (quoting *PruneYard Shopping Center v. Robins*, 446 U.S. 74, 84 (1980)). However, the owner's interest in a "relatively undisturbed" commercial use of property "is clearly relevant" in this case. *Id.* at 436. As the Court further noted, demanding that a stranger be allowed to enter private property "is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* The Board's Order to petitioner Lechmere, fails this test, for it is unlimited in scope and duration. Petition App. B-27 ¶1.

*PruneYard*, *supra*, involved the scope of state law access to private property in the context of federal law accommodation.

---

<sup>11</sup>The Court appears to distinguish between permanent takings with those that "do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." *Loretto*, 458 U.S. at 435 n.12. In this context, the Court found that the CATV company's "reliance on labor cases" for an authorization of access was "misplaced," because the access that could be allowed was limited in *Central Hardware*, 407 U.S. at 545, to organizers, at limited non-working areas, for the duration of that activity. This accommodation the Court stated was "limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." The Board's adopted Order against petitioner Lechmere is not so limited in length of time or specific place. Petition App. B-27. Nor does the Board undertake to apply the Court's *Babcock & Wilcox* holding to the fullest extent as discussed in Part II, *supra*.

The shopping center there covered 21 acres and received 25,000 persons daily. When high school students sought to gather petitions to Congress, they were ejected. The center had a nondiscriminatorily applied no-solicitation policy. 447 U.S. at 77, 78.

The Court found that the California interpretation of state constitutional rights was "literally a taking," but not unreasonable because *PruneYard* retained the right to "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Id.* at 83. Furthermore, the record in *PruneYard* did not show that because of its size, that the expressive activity would "impair the value or use of their property as a shopping center," *id.*, or that the right to exclude others was in context "essential to the use or economic value of their property." *Id.* at 84.

We believe that the concurring opinions of Justice White and Powell in *PruneYard* demonstrate that the Court would not countenance an intrusion under the United States Constitution where the property is of a different character.<sup>12</sup> Specifically, the First Amendment would contain an important limitation on governmental rulings to require access to private property to allow the expression of views. It is incorporated in every property owner's property interests.

First, in Justice Powell's view, the decision in *PruneYard* did not apply to all shopping centers and that even large shopping centers might be able to demonstrate in the context of California law, that a private owner's undertaking to regulate the time,

---

<sup>12</sup>While agreeing that the U.S. Constitution did not "forbid" California from adding an overlay to federal free speech and property rights in the context of that specific ruling, Justice White argued that "the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property." *Id.* at 95. He furthermore observed that the owner's free speech rights in "other circumstances" would prevail. Justice White thus joined Justice Powell's concurrence in *PruneYard* also.



place, and manner restriction could "create a substantial annoyance to customers that could be eliminated only by elaborate and expensive" owner supervision, and thus, reset the balance. 447 U.S. at 96. Furthermore, the First Amendment principle gleaned from the "Live Free or Die" motto of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977), "protects a person who refuses to allow use of his property as a marketplace for the ideas of others." *Id.*<sup>13</sup>

Therefore, First Amendment interests are directly involved where the government "forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." *Id.* at 98. This is because the public is likely to become confused by identifying the expression occurring on the property as the view of the owner. "The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 2044, cannot restore his 'right to refrain from speaking at all.'" *Id.*<sup>14</sup>

---

<sup>13</sup>In *Wooley*, 430 U.S. at 714, the Court understood the First Amendment to include both the "right to speak freely and the right to refrain from speaking at all....A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (Citations omitted).

<sup>14</sup>The potential for personally unwelcome speech in commercial establishments is expressed well by Justice Powell, 447 U.S. at 99:

If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice; he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he had been

This opposition to views an owner feels are either morally repugnant or adverse to the business purpose under which he has invited certain members of the public, extends to every form of speech. It does not require that the owner object in order to preserve his own beliefs. As in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), where non-union workers are not compelled to state reasons why they object to union agency dues, owner's should not have to surrender their First Amendment views to the public or to specific strangers. Consequently, Justice Powell's concurrence in *PruneYard* stems from the fact that *PruneYard* did not present any argument that *Abood* supports the "right to exclude speakers from their property. Nor have they alleged that they disagree with the messages at issue in this case." *Id.* at 100, 101.<sup>15</sup> Hence, the First Amendment was not shown to be burdened in *PruneYard's* case.

The Board's decision in this case incorporates none of these considerations. Its "accommodation" of the Section 7 and property rights involved here stopped at finding that Lechmere's location "is commercial in character" and "that the impairment would not be substantial." Petition App. B-6. These conclusions fail to account for the fact that the property right articulated in *Babcock & Wilcox* is not broken by its commercial character or that the property right involves a "bundle of rights," which the Board must consider, including the First Amendment.

The Board's analysis in this case is therefore improper. Its utilization of the analysis set out in *Jean Country*, 291 N.L.R.B. No.4 (1988), is therefore not a permissible test under the U.S.

---

forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues.

<sup>15</sup>Justice Powell also viewed that these First Amendment precepts would prevail in cases arising under the labor law, causing rulings by the Board to be "presumptively unconstitutional" under *Abood*, *Central Hardware*, *Hudgens*, and *Babcock & Wilcox*. *PruneYard*, 447 U.S. at 98 n.2.



Constitution or the restrictions previously carved out in *Babcock & Wilcox* by the Court. Because this conflict involves precious rights essential to our economic and political system, certiorari should be granted.

### CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court grant a writ of certiorari to the First Circuit to review these important questions and settle the circuit conflict.

Respectfully submitted,

Gerard C. Smetana\*  
RICHMAN, LAWRENCE,  
MANN, GREENE &  
SMETANA  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 855-0300

*Of Counsel:*

Michael E. Avakian  
RICHMAN, LAWRENCE, MANN,  
GREENE & SMETANA  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 659-8687

Attorneys for Amicus Curiae  
Council on Labor Law

Equality

February 15, 1991

\*Counsel of Record

No. 90-970

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

JOINT APPENDIX

HON. KENNETH W. STARR  
*Solicitor General*  
Department of Justice  
Washington, DC 20530  
JERRY M. HUNTER  
*General Counsel*  
D. RANDALL FRYE  
*Acting Deputy General Counsel*  
NORTON J. COME  
*Deputy Assoc. General Counsel*  
LINDA SHER  
*Assistant General Counsel*  
LAURENCE S. ZAKSON  
*Attorney*  
National Labor Relations Board  
Washington, DC 20570

ROBERT P. JOY  
*Counsel of Record*  
KEITH H. McCOWN  
BENJAMIN SMITH  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666  
*Counsel for Petitioner,*  
*Lechmere, Inc.*

## TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries .....	1
General Docket of United States Court of Appeals .....	2
Stenographic Transcript of Hearing before Administrative Law Judge .....	6
Testimony of:	
Roger Samuelson, .....	14
Lisa Meucci, .....	22
Cross .....	28
Redirect .....	49
Recross .....	50
Giovanni Cassarino, .....	51
Mark Espinosa, .....	52
Joseph C. Gagnon, .....	55
Roger Samuelson (Recalled), .....	57
Cross .....	85
Redirect .....	104
Lisa Meucci (Recalled), .....	109
Giovanni Cassarino (Recalled), ...	111
Cross .....	111
Joint Exhibit:	
No. 1-Stipulation of Facts .....	114
Joint Exhibit 4A-Attached to Stipulation of Facts-Full Page Ad Hartford Courant: Tuesday, June 16, 1987 .....	119
No. 2-Drawing of Premises of Lechmere Plaza .....	121
No. 3-No Solicitation Policy .....	123
General Counsel's Exhibit:	
No. 1-Charge .....	126
Complaint and Notice of Hearing .....	128
Respondent's Answer .....	132
No. 2-Union Literature .....	135
No. 4-Letter to Lechmere Employees, dated July 1, 1987 .....	137



	Page
Respondent's Exhibit No. 3-Letter from Konover and Associates, dated June 26, 1988 .....	140
Respondent's Exceptions to the Decision of the Administrative Law Judge .....	141
Order of the National Labor Relations Board, June 15, 1989 .....	B-1*
Opinion of the United States Court of Appeals for the First Circuit, September 17, 1990 .....	A-1*
Decree of the United States Court of Appeals for the First Circuit, September 17, 1990 .....	A-34*
Order of the United States Court of Appeals for the First Circuit Denying Suggestion for Rehearing En Banc by Lechmere, Inc., October 25, 1990 .....	C-1*
Order of Supreme Court Granting Certiorari .....	152

---

\* Appendix to Petition for Writ of Certiorari

## NATIONAL LABOR RELATIONS BOARD

---

IN THE MATTER OF: LECHMERE, INC.

BOARD CASE NO. 39-CA-3571

---

### CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

<i>Date</i>	<i>Documents</i>
7.21.87	Charge
11.18.87	Complaint and Notice of Hearing
11.30.87	Petitioner's Answer
5.16.88	Hearing - opened
5.17.88	closed
9.30.87	Judge's Decision
10.28.88	Respondent's Exceptions
10.28.88	Respondent's Request for Oral Argument (denied see DO, fn. 1, pg. 1)
12.2.88	Charging Party's Opposition to Respondent's Exceptions
12.2.88	General Counsel's Cross-Exceptions
12.2.88	General Counsel's Reply Brief (Answering Brief)
6.15.89	Decision and Order

## GENERAL DOCKET

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

Case No. 891683

LECHMERE, INC.  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD

NO. BELOW: 39-CA-3571, 295 NLRB No. 15

JUDGE BELOW:

DATE OF ORDER: JUNE 25, 1989

NOTICE OF APPEAL FILED:

PETITION FOR REVIEW: JULY 13, 1989

## ATTORNEYS FOR APPELLANT

*Robert P. Joy, Esq.*, Morgan, Brown & Joy, One Boston Place, Boston,  
MA 02108; 617-523-6666

## ATTORNEYS FOR APPELLEE

*Aileen A. Armstrong, Esq.*, 1717 Pennsylvania Ave., N.W., Washington,  
D.C. 20570; 202-254-9616-7*J. William Gagne, Jr., Esq.*, Gagne and Collins, 207 Washington Street,  
Hartford, CT 06106; 203-522-5049*Howard E. Perlstein, Esq.*, 1717 Pennsylvania Ave. N.W., Washington,  
D.C. 20570; 202-254-9031

1989

## FILINGS-PROCEEDINGS

July 13 Petition for Review received and filed. Case docketed and notices mailed. (cm)

July 19 Appearance of Robert P. Joy, Esq., for appellant, received and filed. (cm)

## FILINGS-PROCEEDINGS

1989

July 20 Appearance of Aileen A. Armstrong, Esq., for the Respondent, National Labor Relations Board, received and filed. (lp)

July 20 Notice Service Acknowledgement, received and filed. (lp)

Aug 23 Cross-Application for enforcement of an order of the National Labor Relations Board, received and filed. (cd)

Aug 23 Certified list of the National Labor Relations Board consisting of three volumes (I, II, & III) received and filed. (cd)

Aug. 28 Appearance of Howard E. Perlstein, Esq. for the respondent, received and filed. (eml)

Aug. 31 Motion filed. Order: (Torruella, J.) It is ordered that the time for filing statement of issues and designation of the contents to the brief be, and the same hereby is enlarged to and including September 8, 1989. It is further ordered that the time for filing brief for appellant and appendix to the brief be, and the same hereby is enlarged to and including October 6, 1989. Notices mailed. (eml)

Sept. 8 Petitioner's Statement of Issue and Designation of Contents of Appendix, received and filed. (cm)  
Petitioner's Answer to Cross Application for Enforcement of an Order of The National Labor Relations Board, received and filed. (cm)

Sept. 28 Motion filed. ORDER (Bownes, J.) enlarging time for filing brief for appellant and appendix to brief to and including October 13, 1989. Notices mailed. (lp)

Oct. 4 Appearance of Richard A. Cohen, Esq., for appellee, received and filed. (efp)

Oct. 13 Brief for the petitioner, Lechmere, Inc., received and filed. Notices mailed (bf)

1989

## FILINGS-PROCEEDINGS

- Nov. 8 Motion filed. ORDER: (Selya, J) enlarging the time for appellee to file its brief to and including November 27, 1989. This case will remain on the January, 1990 session. Notices mailed. (ji)
- Nov. 27, Motion for leave to intervene, received and filed. (Eml)
- Nov. 28 Brief for the National Labor Relations Board received and filed. (bf)
- Dec. 7 Opposition to motion to intervene received and filed. (lb)
- Dec. 14 ORDER: (Torruella, J.) Denying the motion for leave to intervene, as stated in said order. Notices mailed. (ac)
- Dec. 21 Assigned for hearing at the January 1990 session. (jms)

1990

- Jan. 10 Heard before JJ. Torruella, Selya and Bownes. (jms)
- Sept. 17 DECREE: The petition for review is denied, and the order of the National Labor Relations Board is affirmed and enforced. Opinion of the Court by Selya, J. Dissenting opinion by Torruella, J. Notices mailed.(lp)
- Sept. 25 Itemized and verified bill of costs, received and filed. Notices mailed.(ji)
- Sept. 28 Petitioner's petition for rehearing and suggestion for rehearing en banc received and filed. (lb)
- Oct. 25 Order: (Breyer, Ch. J. Campbell, Bownes, Torruella, Selya and Cyr, J.J.) denying the petition for rehearing and suggestion for rehearing en banc. Notices mailed. (rm)
- Nov. 2 Taxation of costs filed. Mandate issued, copy filed original papers returned to NLRB Notices mailed.(eml)

1990

## FILINGS-PROCEEDINGS

- Dec. 27 Notice of filing Petition for Certiorari to the Supreme Court (December 17, 1990) received and filed. (rm)

1991

- March 21 Order from the Supreme Court (March 18, 1991, 90-970) granting the petition for writ of certiorari received and filed. (lb)



[1]

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
Sub Region 39

Case No. 39-CA-3571

In the Matter of:  
LECHMERE, INC.,  
Respondent,  
and

LOCAL 919, UNITED FOOD AND COMMERCIAL  
WORKERS, AFL-CIO,  
Petitioner.

Hearing Room  
One Commercial Plaza  
Hartford, Connecticut

Monday  
May 16, 1988

The above-entitled matter came on for hearing, pursuant to Notice, at 1:15 p.m.

BEFORE:

JOEL BIBLOWITZ, Administrative Law Judge

APPEARANCES:

*For General Counsel:* THOMAS MEIKLEJOHN, Esq., Counsel for General Counsel, National Labor Relations Board, One Commercial Plaza, Hartford, CT 06103

*For Respondent:* ROBERT P. JOY, Esq., Morgan, Brown & Joy, One Boston Place, Boston, MA 02109

*For Charging Party:* J. WILLIAM GAGNE, JR. and BARBARA COLLINS, ATTYS., 207 Washington Street, Hartford, CT 06103

\* \* \*

[5] MR. MEIKLEJOHN: I'd like to make a brief opening statement. As you noted, the formal papers are pretty straightforward and self-explanatory.

There are essentially three issues in this case. All section 8(a)(1) allegations arising out of an organizing campaign by UFCW Local 919.

The organizing campaign involved a retail store operating by respondent in the Town of Newington, Connecticut.

We have an extensive detailed description of the property on which that facility is located, contained in Joint Exhibit 1.

The first issue in this case concerns the charging party's right of access to the property on which the store is located. It's a case arises under, and has to be decided [6] under the standards enunciated by the Board in *Fairmont Hotel* and succeeding cases.

In a nutshell, organizers for Local 919 attempted to distribute handbills to employees of respondent at the Newington store in June and July of 1987, by placing the handbills on employees' cars in respondent's parking lot.

General counsel contends that the Section 7 rights to distribute there handbills outweigh[s]\* (sic) respondent's private property rights.

General counsel takes the position that the private property rights are weak in this case, because the parking lot in question is open to the public. It's shared by respondent with other stores. There are no efforts taken by respondent to restrict or control access to the parking lot. There are no signs or other indications in the parking lot that its use is restricted in any way.

On the other hand, the union's Section 7 rights are particularly strong. They involve organizing rights, which the Supreme Court in the *Sears* case, 436 US 180, page 206, Note 42, stated "that organizing rights are at the core of the purpose for which the National Labor Relations Act was enacted."

And in a recent Board decision called *Emery Realty* 286 NLRB, number 32, the Board found that Section 7 rights outweigh private property rights, relying heavily on the fact

\*Bracketed Inserts indicate corrections contained in Errata List for Transcripts of Hearing.

[7] that the rights being exercised in that case were organizational rights.

Obviously, this is an issue which will be ultimately briefed. And when I get to my brief I'll have to analyze these cases in considerably more detail.

In any event, we'll show that the union A) engaged in the distribution of the handbills in a peaceful fashion; that they attempted to focus their distribution of handbills on employees, placing them on cars driven by people they believed to be employees of the store. And, therefore, these are the reasons that the Section 7 rights outweigh the private property rights. And we then would, therefore, contend that ejecting the union organizers from its parking lot, respondent violated Section 8 of the Act.

Alternatively, if the rights of access, the Section 7 rights, are found to be relatively equal to the private property rights of the respondent, then we would contend that there were no adequate alternative means of communicating available to the union, and that as a secondary position, a fallback position, that even if the rights were relatively equal, that the charging party was still entitled to access to the premises.

I emphasize, and I think I've made it clear that initially we're contending that the Section 7 rights outweigh the private property rights, regardless of alternative means [8] of communicating with employees.

\* \* \*

JUDGE BIBLOWITZ: Mr. Joy?

MR. JOY: I would, Your Honor.

[9] I believe that the evidence will show that the private property rights here in question are stronger than the Section 7 rights asserted. And that, in any event, the union had effective reasonable alternative means of communicating its message to the employees.

I would assert that the analysis advanced by Chairman Stevens [Stephens], and that's stated by the Supreme Court in

the case of *NLRB v. Babcock and Wilcox* is the appropriate level of analysis here. That is, that one should first look at whether there was a reasonable alternative means of communication. And only after deciding that there was not should the judge engage in balancing of the private property rights with the Section 7 rights.

But we would assert that under whatever level of analysis is employed, whether it's the *Fairmont Hotel's* level of analysis, mode of analysis, or the *NLRB v. Babcock and Wilcox* level of analysis, the respondent should prevail. And for these reasons: First of all, the strength of the property right should be looked at with respect to the use and restrictions placed upon the use of that property.

The evidence here today and tomorrow, if we go beyond today, will show that this respondent has gone to great lengths to restrict the use of this property, this private property, to patrons of its store, and only to patrons of its store. And it has uniformly enforced that [10] rule. The evidence will be presented this afternoon and tomorrow that will show that that is true without exception, as to non-employees of this respondent.

Secondly, the nature of the property would argue for the strength of the private property right here, as opposed to the Section 7 right. This is a stand alone store in a plaza. This is not an arcade or a mall, such as was present in the Emery Realty case cited by counsel for the general counsel earlier today.

That case, and I will go into a little further explanation, will be easily distinguished as the evidence unfolds in this case. It was a 47 story office tower, the Carew Town [Tower] in Cincinnati, I believe, or Indianapolis. And it had an arcade running from one public street to another. It was open 24 hours a day, and the public used it as a cut-through.

You will find, in looking at Joint Exhibit 2, and you will see that Lechmere is a stand along (sic) store, unconnected to the



other stores in the plaza. It is separated by some 100 to 114 feet. There is no bridge or walkway or anything else that connects it. It stand (sic) alone.

It does have on its doors decals which say, and I will quote from the stipulation of facts, that to the public: "No soliciting, canvassing, distribution of literature or trespassing by non-employees in or on the premises, in the [11] store or on the premises."

So to say that the evidence will show by stipulation now entered into the evidence, proves that there is posting of this property. I admit that there is no sign right out at the front entrance that speaks of no solicitation.

Now the no solicitation policy of the store was promulgated in 1982, and we have so stipulated. That policy, which is now marked as Joint Exhibit 3, states in relevant part that non-associates, and by the way I should state, and the evidence will show, that this company refers to employees as associates. That is interchangeable with the term employee.

That policy states, in relevant part, "non-associates are prohibited from soliciting and distributing literature at all times anywhere on company property, including parking lots. Non-associates have no rights of access to non-working areas, only to the public in sellings areas of the store, in connection with its public use."

That policy, as I said, preceded the advent of this organizational activity by some five years.

Now the parking lot, as shown on the map, has two areas. And the public, as I said, is invited for the purpose of shopping. This is the Berlin Turnpike. The speed limit is 50 miles an hour, as the stipulation exists. The public is not going to be driving 50 miles down the road [12] just to pull in and walk through this shopping plaza, like they might do in a shopping mall in a suburban area on a Friday night, which would be the locus of social activity. This is not that kind of a situation. And this entrance indicates that. As we have stipulated to,

people are driving by at 50 miles an hour. Therefore, the inference to be drawn, we would argue, is that people are coming to Lechmere to shop, and to these other stores to shop.

Let's analyze the Section 7 right for a moment. It is true that at the advent of this activity the union was focused on the employees, and therefore, was engaged in organizational activity. *Fairmont Hotels*, however, says the manner with which that right was exercised bears in the balancing analysis here. Let's look at the manner in which that right was exercised. The evidence will show that the first day that representatives of the United Food and Commercial Workers showed up on Lechmere's property, they went inside the store and began to leaflet inside the store, and were advised that there was a no solicitation, no distribution policy, and the evidence will show that they, nevertheless, went into the warehouse area, which clearly has a sign "No associates". And testimony will show that they went into that area and came out, where nobody argues they had a right to be.

By the way, nobody is arguing that they had a right [13] to be in the store either. And they were asked to leave. And they did leave. But shortly thereafter they were back in again. And two days later they were back in again, and again.

And the evidence will show that the manner with which this union exercised its Section 7 right, was totally in disregard of the no solicitation policy, which they were advised of from the first time that they came into that premise.

The second point I want to make is that with respect to the Section 7 right, the union changed its audience, its intended audience, after August 3rd of 1987. It began to focus on the public. It changed from its intended audience of the employees to the public at large. And what it did was it began to have newspaper advertisements published focusing at the public, telling them that Lechmere was a non-union store, etc. And then began picketing on August 7th.



And the evidence will show, the stipulation is actually now in, that picketing began on August 7, 1987 on that grass strip that is the public area up by the Berlin Turnpike, and continued without interruption, without any request by any representatives of Lechmere to cease that activity and vacate those premises, from August 7th through March of 1988. That property comes within four feet of the Lechmere parking [14] lot.

The evidence will show that the employees of Lechmere are asked to park in this section, which borders that grass strip. That picketing took place without interruption for eight months four feet away from the employee section of the parking lot.

The evidence will show that the employees arrived approximately a half hour before the store opens in numbers. It's pretty easy to identify who they are. And once you see where they all park the first day you can easily determine who are employees. And the evidence will show that.

And not only will the evidence show that, but the evidence will show that indeed this union did take down license plate numbers, and go to the Connecticut Division of Motor Vehicles, and get names and addresses. And the evidence will show, we will provide testimony, that all one has to do in the State of Connecticut is to take a license number up the street to Wethersfield, ten minutes away, walk into the Division of Motor Vehicles, hand the person behind the counter a license plate number, as many as you want, and get back, once they punch it into the computer, and you will get back a whole list of names and addresses. And this union did that.

And, therefore, I would argue that they had reasonable [15] alternative means of communication, and did use them.

The evidence will show that they mailed material to the homes of employees. They made telephone calls to the homes of employees. They made personal visits to the homes of employees, all presumably, although not exclusively, on the

basis of information obtained from taking down license plate numbers.

\* \* \*

[16] Now, by the way, the evidence will also show that the 90 percent of the employees employed in the June, July and August time frame of Lechmere at its Newington store, live in the towns of Hartford, Newington, and New Britain. The newspapers advertisements which have been submitted, or have been about to be submitted as part of the joint stipulation, which I have original copies of it, and which I'll show your Honor a sample of, were published either full page or quarter page in the Hartford Courant, which is one of the largest, if not the largest, newspaper in this area. And we will present evidence that its circulation circumferenced places: Hartford, Newington, New Britain almost in the heart of its circulation area.

The New Britain Herald was also a newspaper used for advertisement. And again a large section of a number of the employees, as the evidence will show, reside in New Britain.

So that fact as well will bear on the fact of reasonable alternative means of communication.

\* \* \*

[17] JUDGE BIBLOWITZ: Mr. Meiklejohn, do you wish to put [18] a witness on?

MR. MEIKLEJOHN: Yes. Before I do, I've no intention of engaging in a lengthy argument with what counsel stated. I just would like to note for the record that it is general counsel's position that what went on inside the store is totally irrelevant to these proceedings. And I'll be raising that objection at an appropriate time.

And, likewise, the fact that they changed the purpose after they were barred from the premises is irrelevant to a determination of whether they're entitled to go onto the parking lot for the purposes of reaching employees, before they engaged in

other activities at a later date, directed at another audience.

JUDGE BIBLOWITZ: We'll get to that, if we have to. Witness?

MR. MEIKLEJOHN: Yes. General counsel calls Roger Samuelson.

Whereupon, ROGER SAMUELSON  
having been first duly sworn, was called as a witness herein,  
and was examined and testified as follows:

JUDGE BIBLOWITZ: Please be seated. Your first name is Roger and S-A-M-U-E-L-S-O-N?

THE WITNESS: S-o-n.

JUDGE BIBLOWITZ: Mr. Samuleson, you'll first be [19] questioned by Mr. Meiklejohn. He's the attorney for the Labor Board, and maybe Mr. Gagne, and then by Mr. Joy possibly.

Okay, Mr. Meiklejohn.

*Direct Examination*

By Mr. Meiklejohn:

. . .

Q. . . . Okay. Mr. Samuelson, by whom are you employed?

A. Lechmere.

Q. And what is your position with Lechmere?

A. General manager.

Q. And are you general manager of any specific facility?

A. The Newington, Connecticut facility. Yes.

Q. And, as general manager, do you have the authority to hire and fire employees?

A. Yes, I do.

Q. Request permission to question the letter. (sic) Have

you been the store manager since that store opened? Excuse me, general manager since the store opened?

A. That is correct.

[20] Q. And, as general manager, are you essentially the highest official of Lechmere at the store, with full time responsibility for that store?

A. Yes, that's right.

Q. You would report to somebody in the heirarchy of the company, outside the store? Is that right?

A. Yes, that's correct.

Q. Now let me show you what has previously been received in evidence as Joint Exhibit 2. I'd like to ask you, is there a — well, first of all, the area in front of what is marked as the front entrance, that is all an open parking lot? Is that correct?

A. That's correct. That's an open parking lot.

Q. Is there any particular area of that parking lot where employees are directed or instructed to park?

A. Yes, they're instructed to park in the area. There's a dog leg there that says grass, and the other area that says grass. So in that general area is where the employees are asked to park.

Q. Let me ask if you could mark the word "employee" in the vicinity where employees are requested to park, on the map?

A. Would you like a circle around it?

Q. That sounds like a good idea.

A. I'd say in that generally in that area.

[21] Q. Before we turn away from this map completely, directly at the opposite end of the parking lot is a block marked "plaza", and that's a facility that's designed for 13 stores? Is that correct?

A. That is correct.

Q. I think last summer there were only four stores in there. We stipulated that. As time as gone on, has other of those stores found tenants?

A. Yes. Back that summer the entire building was under construction. Other residents were in there at that point, with the rest still being under construction. Currently today there are more open.

Q. I am sure that as time passes that the owner of the building hopes that more of those will be filled.

A. I'm sure his desires are all open.

MR. JOY: Objection.

JUDGE BIBLOWITZ: Overruled.

BY MR. MEIKLEJOHN:

Q. In fact there is a sign in front of that property, advertising for tenants of the other store?

A. Yes.

Q. Now is there any — are there any restrictions which would prevent customers or employees of the satellite stores, or the stores in the plaza, from parking in the area which you've marked "employee"?

[22] A. No, there would not be, other than it's a great distance to walk. It's just convenient to park there.

Q. But if perchance business was very good, and the parking lot immediately adjacent to the plaza was filled, cars could park as far away as the area marked "employees"? Is that correct?

A. I would imagine that's possible. Yes.

Q. And if somebody came to the store on foot from a neighboring store — there's a Grossman's, which is a home improvement center — well, let's see, this hasn't been marked on this either. The north of the property is roughly the area marked Pascone Street? Is that correct?

A. Yes.

Q. So to the south of the store, immediately adjacent to Lechmere's, or immediately behind Lechmere's, is a Grossman's Home Improvement Center? Is that correct?

A. That's correct.

• • •

[23] By MR. MEIKLEJOHN:

• • •

Q. This grass strip, it continues onto the border of the Grossman's store as well? Is that correct?

A. Yes.

Q. So somebody could walk up — there's no sidewalk up there, but somebody could walk up on the grass strip to get from one property to the next?

A. There is no sidewalk, but Grossman's does have a divider fence between our facility and their facility.

Q. So you couldn't cut directly from one property to the other? If you wanted to walk from Grossman's — it's called Lechmere Plaza? Is that the name?

A. Yes.

Q. If you wanted to walk from Grossman's to Lechmere Plaza, you'd have to come around and walk up the grassy [24] strip?

A. You would have to walk up a steep incline to the curb area, where you could walk along the curb line or grassy area to our plaza.

Q. And there would be no barriers or signs or anything restricting someone from walking through the employee parking lot to the plaza, would there?

A. No.

Q. Just to make it clear, the fence that you referred to doesn't extend across the grassy strip, does it?

A. No, it does not go through the curb line.

Q. Okay. What type of products does Lechmere sell?

A. Basically Lechmere is a retailer selling hard lines, which for the layman, would be television sets, audio equipment, housewares, sporting goods, watches and so forth. Clothing would be soft lines, and we don't carry clothing.

Q. During the summer months, can you estimate how many customers you would serve per day?

A. Not off the top of my head.

• • •



[25] Q. Can you tell us approximately, or is that too difficult?

A. Approximately 75 a day.

Q. That would be the number of customers you actually sell goods to?

A. During the summer months, as you indicated. That would change in different seasons. Christmas season gets a lot of business.

Q. But the 75 you're estimating as an average figure, would just be people you actually sell something to? Correct?

A. Yes.

Q. Well, not everyone who comes into the store buys a product from your store? Is that correct?

A. That's true.

. . .

[28] Q. Well, how many people would you say you have in the store on a good day in the summer? Say a sunny Saturday? A sunner [sunny] Saturday would be a good shopping day?

A. If it was a sunny hot Saturday where people were buying fans and air conditioners it might go upwards to 500 people.

Q. Is it true that on June 18, 1987 representatives of United Food and Commercial Workers, Local 919 placed handbills on the windshields of cars in the parking lot at the Lechmere facility?

A. Yes, June 18th they were definitely in the parking lot putting literature on, as well as inside the store.

Q. I'm just asking you about what took place in the parking lot.

A. Yes, in the parking lot, they were outside placing [29] handbills on the windshields of cars.

Q. Were those handbills placed largely in the area that you indicated as the employee parking lot that you circled?

A. Yes.

Q. Did you instruct security personnel from the store to direct those union representatives to leave the property, and to escort those union representatives off of the property?

A. No, that was basically my job. When they had arrived, or one of my senior staff, we would go out there and give the direction that we had a no solicitation policy, and enforce that. We would ask our loss prevention people to collect the data from the various windshields.

Q. First of all, you used the term loss prevention people. Those are essentially security personnel?

A. That term. Yes.

Q. And you said you instructed them to remove the data. What that means is you instructed them to remove the leaflets from the windshields?

A. That's correct.

Q. You personally with someone else, or by yourself, went out and instructed the union representatives to leave the property?

A. Which occasion now?

Q. We'll start with June 18th. How many occasions did [30] they place leaflets on windshields on June 18th?

A. Three times.

Q. Did you instruct them to leave the property all three times?

A. No, I did not. My assistant store manager, Steve Mittler, had done the instruction at the 10:00 A.M. event.

Q. That was the first one?

A. Yes.

Q. And you personally did it the second two times?

A. The second time I did, and the third time my assistant manager again, Steve Mittler, had done, I believe it was the five o'clock removal.

Q. The property you instructed them to leave was the entire parking lot? Is that correct?

A. That's right. It was on Lechmere property.

JUDGE BIBLOWITZ: These were all on June 18th, these three incidents.

THE WITNESS: Yes.

BY MR. MEIKLEJOHN:

Q. When you refer to the Lechmere property you are also including the portions of the parking lot which you and Newington Commercial Associates share an ownership interest in? Correct?

A. Yes. Although on that particular occasion they were distinctly on the Lechmere part of that property.

[31] Q. Well, when you say they were distinctly on it, if I was standing in the parking lot there is no delineation of which portion of the parking lot belongs to Lechmere, and which part is shared with Newington?

A. No, that is true. There is no painted line to show where the halves are.

Q. Now you say you instructed the security personnel to remove the leaflets, the documents, from the windshields. Did they bring you one or more copies of the leaflets in question?

A. Yes, they did.

. . .

Q. I show you a document that's been marked for identification as General Counsel Exhibit 2, and ask you whether this is the leaflet which was placed on employees' cars on June 18th?

A. There is another leaflet which rings a bell, which was totally black and white, with a self-stamped envelope that I am also familiar with.

Q. Let me ask you this. This was a leaflet which was [32] placed on employee cars on one date?

A. This is one. Whether the date was the 18th or 20th, I am not sure of at this moment. But this is one of the leaflets that were distributed. Yes.

Q. There were also leaflets placed on employee cars on June 22nd? The 20th and 22nd? Correct?

A. That's right.

Q. I'm not going to ask you about the 20th, but on the 22nd did you also instruct your security personnel to remove the leaflets from the cars?

A. Yes.

Q. And did you also instruct individuals distributing leaflets to leave the entire Lechmere property?

A. Yes. Going over those three days, yes, we had asked — quoted our no solicitation policy, and asked them to please leave the Lechmere property.

Q. And on all those occasions they left when instructed to do so? Is that correct?

A. Not immediately, but yes, they eventually left.

Q. The document you have in front of you, General Counsel's Exhibit 2, is that one of the leaflets that was placed on employee on one of those days?

A. Yes.

. . .

[33] Q. I'm showing you the document, which has been marked for identification as General Counsel's Exhibit 3, GC-3, and ask you if this is also a leaflet which was placed on employee cars on one of those dates?

A. This is a partial part of one of those leaflets that was put on the cars. Yes.

Q. There was more to the document to that?

. . .

[34] A. Yes. As I stated earlier, there was a stamped self addressed enveloped addressed to the union, that was attached and stapled onto all these. So this is a partial.

. . .

[35] Q. The envelope was postage paid by recipient, or required no postage?

A. That's correct.

Q. Do you have anyone who is assigned to patrol the parking lot, and assure that it is not used by anyone other than

employees and customers of Lechmere or the satellite stores?

A. At which point in time? Back when the activity was on?

Q. Prior to June 18th did you have anyone performing that duty?

A. Not 100 percent of the time. Loss prevention is part of their job, would be to also review what might be going on in the parking lot in general. There is always the concern for associate's cars. And while they had no easy access, they would occasionally walk out there just to see if there were any activities.

Q. They are looking to see whether somebody is vandalizing or breaking into a car in the parking lot? Is that the idea?

A. That's correct.

Q. They're not looking to see if there's someone there who is not planning to shop at one of the stores?

A. No. How would you distinguish that?

[36] Q. I don't think you could.

\* \* \*

JUDGE BIBLOWITZ: Mr. Meiklejohn?

[37] MR. MEIKLEJOHN: Yes. General Counsel calls Lisa Meucci.

\* \* \*

*Direct Examination*

BY MR. MEIKLEJOHN:

Q. Miss Meucci, by whom are you employed?

A. By United Food and Commerical Workers Local 919 in Hartford, Connecticut.

Q. What is your position with Local 919?

A. Business representative/organizer.

Q. How long have you held that position?

A. Since June 1, 1987.

Q. You were here when Mr. Samuelson described the placement of leaflets on cars in the parking lot. Were you [38] involved in the placement of those leaflets in any way?

A. Yes, I was.

Q. What was your involvement in that?

A. The morning of June 18th I placed them on the windshields of the store, of the cars outside the store in the employee parking area.

Q. Were you aiming these leaflets at any particular audience?

A. The employees of Lechmere.

Q. What steps did you take to insure or to attempt to insure that the leaflets reached that particular audience?

A. Arriving at the store between 9:15 and 9:30, making sure that the people who parked their cars were employees. The store opened up at ten o'clock, so most people that arrived at the store between 9:30 and 10:00 were employees.

Q. After you determined who were employees, or who came to the store before ten o'clock, what did you do?

A. We would put handbills on the windshield of their car.

Q. Drawing your attention to June 20, 1987, which was a Saturday, do you remember what you did that day, that morning?

A. Yes, I met the representatives from Local 919, three other representatives and myself met at Bradlee's parking lot across the street from Lechmere in Newington, on the [39] Berlin Turnpike.

Q. Approximately what time was that?

A. Approximately 9:30 Saturday morning.

Q. And after you met them there what did you do?

A. We went in two separate cars to Grossman's parking lot in Newington.

Q. Where is that located?

A. To the south of Lechmere. As you pass Lechmere it's on the right hand side, south of the store on the Berlin Turnpike also.

We walked up the grassy knoll that Mr. Samuelson described earlier, up the side of the road on the curb, up to



Lechmere, to the first entrance, the one closest to the store. And we stood on either side of the entrance and attempted to handbill the employees coming into work in the morning at 9:30, 9:25, 9:40,

Q. Then what happened?

A. Mr. Samuelson, I assume, or his assistant, assistant manager, and three security guards, came out and asked us to leave the property.

Q. Let me show you Joint Exhibit 2.

JUDGE BIBLOWITZ: Before you do that, could I get a stipulation, Mr. Joy? Would it be correct to say that the store opens every morning, or at least Monday through Saturday, at 10:00 A.M.?

[40] MR. JOY: At that time.

JUDGE BIBLOWITZ: At that time? Would you stipulate to that?

MR. JOY: Yes, Your Honor.

JUDGE BIBLOWITZ: Mr. Gagne?

MR. GAGNE: Yes, Your Honor.

JUDGE BIBLOWITZ: Okay, stipulation is received. Ten o'clock at that time every morning, Monday through Saturday.

BY MR. MEIKLEJOHN:

Q. I show you what's been received in evidence as Joint Exhibit 2, and ask you if you could indicate on that, first just by pointing, where on the map you were standing with the handbills?

A. Right here.

MR. JOY: May I approach, please?

JUDGE BIBLOWITZ: Yes, sure, please. That's the first entrance, I assume the entrance right before the grassy knoll on the Berlin [ ] Turnpike?

THE WITNESS: Yes, Your Honor.

JUDGE BIBLOWITZ: Okay.

BY MR. MEIKLEJOHN:

Q. Could you mark a letter "A" in the area where you were standing?

JUDGE BIBLOWITZ: You meaning she and the other [41] individuals?

BY MR. MEIKLEJOHN:

Q. Were the other representatives of Local 919 standing in approximately the same area?

A. Yes. Exactly the same area as myself.

Q. I think I skipped this. Who were the other representatives of Local 919, who were there that morning?

A. John Cassarino, Mark Espinosa and Cliff Gagnon.

Q. Now would you describe what took place while you were standing in that area?

JUDGE BIBLOWITZ: This is on June 20th?

Q. On June 20th.

A. Saturday morning. On June 20th, Saturday morning, myself and three of my co-workers went to that entrance of Lechmere, and stood at the opening and attempted to hand out leaflets to the employees.

Within three to five minutes Roger Samuelson, his assistant manager I assumed, and three security guards came out and asked us to leave the property. At that time we hadn't given out any pamphlets at all. And they asked us to leave their property, and we said we thought we were on public property. We assumed ten feet from the road in would be town property or public property. And they said that that was their property and we'd have to leave or they would call the police.

[42] Two of the security guards had cam corders, and at that time Roger Samuelson started to dictate into the cam corder: "I, on this 20th of June morning, at 9:45, am asking union officials to leave our property. They have refused to leave and I am now calling the police." That was all on tape.

And they continued to tape us, and put us on the cam corder while he and his assistant manager I think went to call the police.

Within ten minutes the police arrived in two separate cars. Officer Gallagher came over and asked us our names and birth dates. And we furnished him with that information, and our addresses. We gave him our local's address.

He started to explain that the speed limit on the highway. It could be dangerous for us to be near the highway, and we [were] by no means on Lechmere property. We were on public property.

Q. Who said that?

A. The police officer, Officer Gallagher, said we were on public property, but we'd have to be careful being so close to the road right on that little ten foot knoll.

So Roger Samuelson and the police officer went and discussed something, and Officer Gallagher came back and said he had to discuss something with his sergeant. And he [43] called in on the police radio.

\* \* \*

[44] Q. What happened after the conversation between Mr. Samuelson and the police officer?

A. Well, the police officer then said to us: "I have to call my sergeant to check on something", so he called his sergeant, and he came back and he said we could stay there, but again we couldn't obstruct the traffic flow coming in and out of the parking lot, or on the highway.

\* \* \*

Q. What happened after the police officer told you you could stay?

A. We ended up leaving because the security guards were out there anyways, and I don't know of too many employees that would stop and pick up a handbill with the manager, assistant manager, and three security guards with a cam corder taking pictures, so we ended up leaving.

Q. Now did you make any other efforts to communicate with employees at the Lechmere store?

A. We tried a newspaper ad, and not getting any response [45] back from those, we were concerned that maybe the high school kids weren't reading the newspaper. So weren't noticing the ads. So we also tried phone calling, by getting the license plate numbers, and then looking them up at the Motor Vehicle Department.

Q. How many employee names were you able to obtain through Motor Vehicle Department?

A. 49, 41 of which we could use, because eight of those were assistant managers, security managers.

Q. What did you do after you obtained the 41 names? What did you do with those 41 names?

\* \* \*

A. Made house calls and some phone calls.

Q. And what results did you obtain from those contacts?

A. Generally the parents would intervene, so we didn't get a chance to talk to the employees or associates of Lechmere.

Q. When you say the parents would intervene, in what fashion?

A. Saying their son or daughter was just a part time high school student, and wasn't really interested in getting involved with the union.

Q. Now you've made a number of references to high school students and high school kids, what high school students are (46) you referring to?

A. Mostly Newington High School. The associates of the Lechmere store, the employees.

\* \* \*

[47] MR. MEIKLEJOHN: No further questions of this witness, Your Honor.

JUDGE BIBLOWITZ: Mr. Joy?

MR. JOY: At this time I'd like to call for the affidavit, if any, of the witness.

\* \* \*

[48] *Cross Examination*

BY MR. JOY:

Q. Ms. Meucci, you provided affidavits to the Regional Director in this case, did you not?

A. Yes.

Q. I would just show you two documents, which I would like to ask you to identify. The first document is in the form of an affidavit, and contains on the top of it "statement affidavit". Is that correct?

A. Yes, it does.

Q. Is that a copy of an affidavit you supplied to the Regional Director?

A. Yes, I did.

Q. I show you a second document, which also is entitled "affidavit". Is that a copy of an affidavit that you supplied to the Regional Director?

A. Yes, I did.

Q. And you signed and swore [swore] to the contents of each of these, did you not?

[49] A. Yes, I did.

Q. Now, focusing your attention on the events — pardon me a moment — of June 20th, to which you have already testified, it was your testimony that security guards came out with camcorders? Correct?

A. Yes.

Q. And it was also your testimony that after the police officers came and told you that you could remain on the public area of the grassy strip, you nevertheless decided to leave? Correct?

A. Yes, after they suggested it might impair the traffic flow. It was almost a suggestion we leave.

Q. Almost a suggestion by whom?

A. By the police officer, by Officer Gallagher.

Q. Well, wasn't it your earlier testimony today that you ended up leaving "because of the security guards with the camcorders"?

A. Yes.

[50] Q. Didn't you testify earlier today that you ended up leaving on the 20th, after the police arrived, because of the security guards with the camcorders?

A. Yes.

Q. And you're changing your testimony now?

A. No, I'm not changing it.

Q. Did you just say a moment ago that you left because of a suggestion by the police that you leave?

MR. MEIKLEJOHN: I will object, Your Honor. The record will show whether or not —

JUDGE BIBLOWITZ: Overruled. He's entitled to cross examine fully. Overruled.

BY MR. JOY:

Q. Well, what was the reason that you left that day, after the police had spoken to you?

A. Partially because they told us it might impair the traffic flow, and that we might want to leave because of the danger of the traffic flow. The speed limit is 50 miles and hour. And he said: "You might want to leave because it might impair the traffic flow. Or you might get hurt, because it is a dangerous area to be walking on that strip."

Q. When you say he, to whom are you referring?

A. Officer Gallagher.

Q. Have you spoken to Officer Gallagher recently?

[51] A. No, I haven't.

Q. The last time you spoke to Officer Gallagher was when?

A. On June 20th.

Q. Now in your affidavit you state that (and this is on page 3) — I'll ask you to read it, I can't quite read the writing.

A. It's not my writing.

Q. Can you decipher it?

A. "Five minutes later."

Q. When she started to read it I located the spot. Would you read it, please?



A. "Five minutes later the police arrived. The police explained to the employer that we were on state property, but he told us we might disrupt (I think it's disrupt) traffic flow and must leave. We left."

Q. And was that the reason that you left?

A. Not entirely.

Q. Why didn't you add the rest of the reasons in your affidavit?

A. At that time, to the best of my recollection, that's when we left, because it might impair the traffic flow and he suggested we leave.

Q. And today you're adding another reason why you might have left that day?

[52] A. No, it might impair the traffic flow.

\* \* \*

Q. And that was the reason you left?

A. Partially.

Q. Well, what other reason did you leave?

A. Because he suggested we might leave.

Q. The policeman?

A. Yes.

Q. And those were the reasons why you left?

A. Mm mm.

Q. Answer yes?

A. Yes.

Q. Now you've testified about events which occurred on the 18th of June, 1987? Correct?

A. Correct.

Q. And you testified that you were in the parking lot of the Lechmere Newington store, handbilling the windshields of cars that day? Correct?

A. Yes.

Q. Weren't you also inside the store itself?

MR. MEIKLEJOHN: Objection. Your Honor, the complaint allegation — let me make general counsel's position clear. Is that the union has the right to handbill in a parking

lot. There is no dispute that they also went inside the store to [53] handbill.

General counsel has determined that restricting them and preventing them from handbilling in the store was not an unfair labor practice, and therefore, what took place, and the restrictions that were placed on their handbilling inside the store is totally irrelevant to this proceeding, and I strongly urge that the facts and the testimony taken in this case focus on what is an issue in this case, rather than going far afield on a number of issues which are not before you.

JUDGE BIBLOWITZ: What's the relevance of what they did in the store? It's not alleged as ULP. Are you alleging that if it weren't for the in-store activities you might have allowed the union to engage in the out of store activities?

MR. JOY: I'm saying, Your Honor, that as required by the teachings of the Fairmont Hotel case, 282 NLRB 27, the quoting page, the bottom of page 9 and the top of page 10, "that the factors that are to be taken into consideration in evaluating the property rights versus the Section 7 rights include, among other things, the manner in which the right is being asserted."

I would argue that if one is asserting a Section 7 right, and has a track record of already having ignored and engaged in unauthorized trespassory activity, that relates [54] to the ["] manner in which that right is being asserted."

Not only that, but because of the pattern, hit and miss, inside the store or outside the store, that evidence bears on the reason why the employer decided to put a camera on the premises as well.

So I think from both of the points of view, from both of those points of view, this evidence is certainly relevant.

JUDGE BIBLOWITZ: I disagree. I think when you talk about the manner it's being asserted, I think the whole issue here is the manner, i.e., the leafletting in front of the store. That's the issue here.

The fact that they may have engaged in what you consider wrong-doing, and what general counsel considers no violation previously, that as being in the store, that is not relevant here. I'm only interested in whether they should be allowed, or should have been allowed, to engage in the activities they engaged in outside the store.

So sustained.

MR. JOY: Your Honor, at this time I'd like to make an offer of proof.

JUDGE BIBLOWITZ: Okay.

MR. JOY: And I would like to do it in question and answer form.

JUDGE BIBLOWITZ: By the way, general counsel has [55] admitted that the union did enter the store, so I do have a little background on that. I really don't see any purpose of engaging in long questions and answers as to what they did in the store at this point.

MR. JOY: I take that Your Honor's direction is that I may not engage in a question and answer offer of proof?

JUDGE BIBLOWITZ: Correct.

MR. JOY: However, I would like to state an offer of proof.

JUDGE BIBLOWITZ: Go ahead.

MR. JOY: In some detailed fashion, so as not to be found conclusiary [conclusory] at a later date, in the event that it's necessary to review this issue. Someone might feel it was conclusiary [conclusory].

If allowed to examine the witness, Your Honor, I believe her testimony would show that on June 18th she, along with several other representatives of the United Food and Commercial Workers Union, entered the Lechmere Newington store at around 10:00 A.M., and started distributing pamphlets and authorization cards to the employees.

Indeed, one even entered into the warehouse area. And if allowed to examine this witness, I believe she would testify that one person did enter the warehouse area, which is clearly posted against anyone but associates being allowed to enter.

[56] They left, but then at two o'clock that day, I believe this witness would testify, they returned inside the store, even now after being advised of the no solicitation policy and came right back inside the store, as well as leafleting out in the parking lot.

And, again, I assert the relevant connections to the issue in this case is that they are manifesting just a complete disregard for the posted policy of the premises, including the store itself.

At two o'clock an individual was confronted by Mr. Samuelson and Mr. Mittler. I believe Ms. Meucci was present in the store at the time. He was one Mr. Fayer [Phaiah]. He was asked to leave six or seven times, and refused to do so. And later that day there was an additional incident involving in the store leafleting.

Then, if asked, if allowed to examine this witness, I believe she would testify that on June 20th she again went into the store, knowing clearly what the instore policy is, and she also leafleted inside the store at that time.

I believe it's additionally relevant for the 20th, Your Honor, because when met by representatives of the store at this grassy area, they were just coming out from the Lechmere store on the Lechmere part of the parking lot. And that has a relevant connection to whether or not these gentlemen were asking them to leave the public property. [57] They were just coming out of the store, and I think that bears on the directive that they will testify to themselves later. But I think if asked, she will have to testify that she was in the store, and I believe her affidavit so states.

\* \* \*

Let me add one other piece to that, Your Honor. Literature was found continuously, as I said in my opening statement, in the rest rooms and on the shelves and so forth. And I would like to be able to ask this witness if she, even after the events of June 18th and June 20th, went inside the store and left literature in the restrooms and in the shelves, and put it in merchandise. I think that bears on the reasonable alternative means of communication issue as well.

JUDGE BIBLOWITZ: You can do so. If there is an objection I'll rule on it. I'm not going to make any determination until you ask a question and then there is an objection.

MR. JOY: Okay.

BY MR. JOY:

Q. Ms. Meucci, did you ever go inside Lechmere's Newton store and leave literature in the restrooms?

A. Yes.

[58] MR. MEIKLEJOHN: Objection.

JUDGE BIBLOWITZ: Sustained.

MR. JOY: Your Honor, I'd like to make again an offer of proof, and again incorporate by reference all of the reasons that I've stated in my just recently made offer of proof. And, in addition, add that here again I believe it's relevant to the question of reasonable alternative means of communication.

And if allowed to examine this witness, she would testify that she'd get inside the store and had access to employees.

BY MR. JOY:

Q. Now focusing again your attention on the 18th of June it's your testimony, is it, that you were asked to leave Lechmere property?

A. Yes.

Q. Can you identify particularly who it was that asked you to leave Lechmere property?

A. No, I don't recall.

Q. It wasn't Mr. Samuelson then?

A. On the 18th? I don't think it was Mr. Samuelson.

Q. Now on the 20th, it's your testimony, is it not, that you met other representatives of Local 919 at about 9:30 that morning? Correct?

A. Correct.

[59] Q. And you went to the Grossman's parking lot, and then walked over to Lechmere? Is that correct?

A. Yes.

Q. Was there any sidewalk that you were able to walk on?

A. No.

Q. Did you have to cross a road coming into Lechmere property?

A. No.

Q. Did you have to cross any kind of an entrance to Grossman's?

A. No, we parked in Grossman's parking lot and walked up the grass.

Q. Now tell me exactly what you did as you entered the Lechmere property?

A. We went on Lechmere property. We were on the grassy knoll, that we considered at that time, and still do, public property.

\* \* \*

[60] Q. Take me now, as you came onto the Lechmere property that morning, to what point into the premises you went?

A. Right here.

HEARING OFFICER [JUDGE BIBLOWITZ]: Where you wrote the A?

THE WITNESS: Where I wrote the A.

BY MR. JOY:

Q. At any time were you actually on the Lechmere premises?

A. No, sir, because the store wasn't open yet.

Q. At any time that day?

[61] A. No.

Q. You never came onto the Lechmere property that day?

A. On the 20th?

JUDGE BIBLOWITZ: After ten o'clock or before?

MR. JOY: At any time.

JUDGE BIBLOWITZ: At any time?

THE WITNESS: At any time?

A. We can back once, I believe, in the afternoon to hand-bill.

Q. And did you come onto the Lechmere property at that time?



A. Yes.

Q. Now focusing your attention back on the morning of the 20th, is it your testimony that at that time you did not come onto the Lechmere property?

A. Yes.

Q. And when you came onto the Lechmere property on the 20th, that was in the afternoon, was it?

A. Yes.

Q. Approximately what time?

A. I don't recall.

Q. And where on the property did you go when you came back that afternoon?

A. Parking across the street, just walked across here.

Q. In the section of the parking lot along by the grass strip? [62]

A. Yes.

\* \* \*

Q. Did you go any further into the premises at that time?

A. No, not that I can recall.

Q. At any time later that day did you go any further into the premises?

A. On the 20th?

Q. Yes.

A. I think we handbilled in the store.

HEARING OFFICER [JUDGE BIBLOWITZ]: In the store?

THE WITNESS: Yes.

\* \* \*

[63] Q. And Mr. Samuelson had met you before the police arrived? Isn't that correct?

A. Yes, it is.

Q. And it's your testimony that he told you to get off Lechmere property?

A. Yes.

\* \* \*

[65] Q. And he told you that you were public property, and that you had the right to stay there?

A. He suggested again it might impair traffic flow. He said: "This is public property, but not wanting [I don't want] you to impair traffic flow. The speed limit is 50 miles an hour. The cars go by quite fast." He said: "You might want to leave before you get hurt." He suggested that we were going to get hurt or impair traffic flow. He didn't say: "You will be arrested if you stay."

\* \* \*

[68] Q. Ms. Meucci, did you, or any representative of the union, ever obtain a complete list of the names and addresses of the employees of the Lechmere Newington store?

A. We obtained a list, not a complete list.

Q. From whom did you obtain the list?

A. From the Motor Vehicle Department.

Q. Tell me how you went about obtaining that list?

A. Copied down an employee's registration, bring it to the Motor Vehicle Department.

JUDGE BIBLOWITZ: The registration?

THE WITNESS: The license plate of the employee. And bring it to the Motor Vehicle Department, and they'll give you the name and address that the vehicle is registered to.

BY MR. JOY:

Q. And did you do that in this case?

A. Yes.

Q. How many times did you do it?

JUDGE BIBLOWITZ: For how many people or how many times?

BY MR. JOY:

Q. How many times did you go to the Division of Motor Vehicles?

A. I'm not sure how many times, sir. I obtained 49 names.

[69] Q. And do you have a record of the names you obtained?

A. Yes, I do.

Q. Where is that record now?

A. Our attorney, Tom Meiklejohn.

MR. JOY: Your Honor, I'd request that that be produced so that I may look at it.

JUDGE BIBLOWITZ: If general counsel wants to willingly turn it over, that's fine. I certainly have no objection to that.

MR. MEIKLEJOHN: Your Honor, I see no reason why the document needs to be turned over.

MR. GAGNE: I'd join in the objection. I don't see what relevancy it has to this proceeding.

MR. MEIKLEJOHN: Also, Your Honor, as the witness testified, she was unable to get — the witness testified she was unable to speak to most of the employees through this method. However, the documents which she turned over does contain notations regarding the reactions which some employees had to be contacted by the union. To the extent that those reactions were favorable, I think it would be highly potential for the employer's having great prejudice in then having that information turned over.

Given that fact, and the fact I see no basis for the information being turned over. I would decline to turn it over voluntarily.

\* \* \*

[71] Q. However, getting back to your records, Ms. Meucci, you indicated you were able to get the license plate numbers of 49 employees that worked at the Lechmere Newington store, in what time frame?

A. July through August, or June through August.

Q. And did you yourself attempt to contact these people?

A. Yes.

Q. Did anyone else?

A. Yes.

Q. Would you identify who else from the union attempted to contact employees of Lechmere's Newington store?

A. Mr. Looke came with me on several occasions to make housecalls.

Q. Would you identify his first name?

A. Jim Looke isn't here. He's in the hospital right now. Oh, L-o-o-k-e. Jim.

Q. His position with the union?

A. He was a union representative also.

Q. He would make housecalls with you?

[72] A. Yes. We only did that on two occasions.

Q. Did he make telephone calls?

A. Some.

Q. Do you know how many?

A. No, quite a few of the numbers were unlisted.

Q. How many were unlisted?

A. Out of the 49 eight of those were either assistant managers or managers, so it narrows it down to 41. Out of those I'd say at least 20 were unlisted.

Q. Is that an approximate response, or do you know exactly?

A. That's an approximate response.

Q. Would the notebook that you kept help to refresh your memory as to exactly how many numbers were unlisted?

A. Would you like me to count them?

Q. It calls for a yes or no answer.

A. It would.

MR. JOY: Your Honor, here again, I'd like to offer the notebook for purposes of present refreshment of recollection.

MR. MEIKLEJOHN: Well, if the purpose of this is to have the witness refresh her recollection by reviewing the document, and then requesting the document on the basis that it's been used to refresh her recollection, I would object.

I would object to it being used as a basis for [73] requiring production of the document.

MR. GAGNE: I also object, Your Honor, on the basis that the recollection he's trying to refresh I think is irrelevant to these proceedings. So even if he refreshes the recollection, it is still not relevant to what's going on here.

MR. JOY: Your Honor, I merely state that all Mr. Gagne has to do is read *NLRB v. Babcock and Wilcox, Nico [SCNO] Barge Lines v. NLRB*, and a whole host of other cases that go into the exact definition of what is reasonable alternative means of communication, and what evidence does or does not support the finding, or lack thereof. And this is precisely on point in that regard.

And I might add that it's our position, and it's a position taken by Chairman Stevens, that this is the first line of inquiry in these kinds of cases. So I think it's directly relevant, and I can [sic] assert strongly enough that I'm entitled to get this information.

JUDGE BIBLOWITZ: I don't think general counsel or Mr. Gagne is arguing that this is not what the union did to get in touch with the employees is irrelevant. They are arguing, I believe, that Ms. Meucci's notes in regard to the people she got the names from the Motor Vehicle Bureau, those notes should not be turned over to you.

I don't think they were claiming at any time the [74] fact that they went to get these names, and they tried to call them and visit them. They are certainly not trying to claim that is irrelevant. Is that correct?

You are not claiming that what the union did to get in touch with these people is irrelevant to this proceeding?

MR. MEIKLEJOHN: Well, our principal theory is that regardless of alternative means, they are entitled to access. But it is our backup theory that the availability of the alternative means of access, or the means that were available were inadequate. I can't argue on the question of —

My concern is that there is information in these documents which could be embarrassing to at least a couple of these employees, if it was made available. That's my point.

JUDGE BIBLOWITZ: I'll sustain your immediate objection about using them to refresh recollection. I reiterate that point again. I'm not going to determine how relevant it is. Subpoenas are issued for that. But at this point let's go on.

MR. JOY: For the record, note my exception to that ruling.

JUDGE BIBLOWITZ: I understand.

MR. JOY: Especially given the fact that the witness just testified that it would refresh her memory.

MR. MIEKLEJOHN [MEIKLEJOHN]: I would also note for the record that [75] she did not testify to a lack of memory. She answered the question.

JUDGE BIBLOWITZ: Let's move on.

BY MR. JOY:

Q. How did you know that eight of the 49 were managers?

A. Information from some of the employees.

Q. So you were in direct contact with some employees?

A. One or two.

Q. Could it have been more?

A. No.

Q. But these one or two employees supplied you with information regarding other employees in the store? Correct?

A. Well, Mr. Samuelson identified himself, the assistant manager identified himself. So from there we knew those two, and there were like six more.

MR. JOY: Your Honor, I move to strike as non-responsive. I'd like to have the question read back.

JUDGE BIBLOWITZ: It was responsive. It was partially responsive. You know, you asked how she got that information, and she said two of the individuals Samuelson and the assistant identified themselves. So, so far they're responsive, not totally. There may be more.

MR. JOY: I thought I asked what information these individuals, this employee or employees, provided.

[76] JUDGE BIBLOWITZ: I'm not saying it was totally responsive. There may be more coming.

MR. JOY: Let me withdraw my comment then.

BY MR. JOY:

Q. Apart from Mr. Samuelson identifying himself and his assistant, is it your testimony that you obtained information



that six other employees, whose names and addresses you had, were managers from employees or an employee in the store?

A. An employee in the store.

Q. And how often did you obtain the information from that employee in the store?

A. About what?

Q. How often did you obtain information from that employee about names and addresses?

MR. GAGNE: I would object. She could have been getting information about the odds on the World Series game or something.

JUDGE BIBLOWITZ: He's talking about the information in the question. Overruled.

BY MR. JOY:

Q. How often did you obtain information relating to the names and addresses of other employees in the store, from the employee you talked with?

A. On one occasion.

Q. On one occasion?

[77] A. Mm mm.

Q. Now these other 41, did you compile a computerized mailing list?

A. Yes, we did.

Q. And where did you program that mailing list? On whose computer is that program?

A. On the union's computer.

Q. And in the union's computer there are 49 names and addresses of Lechmere employees?

A. 41.

Q. 41? Okay. Now I'm going to show you — before I do that, let me ask you if, at some point, you stopped attempting to obtain the names and addresses of Lechmere employees by writing down license plate numbers in the parking lot?

A. Yes.

Q. When did you stop attempting to do that?

A. Approximately the end of July.

Q. And why did you stop?

A. We felt that we weren't reaching — we were trying other methods to reach the employees.

Q. And what were those other methods?

A. The newspaper.

Q. Now were you involved in the placing of ads in the Hartford Courant?

[78] A. Not me directly.

Q. Are you familiar with the circulation area of the Hartford Courant?

A. Yes.

Q. Can you tell me what is the circulation area of the Hartford Courant?

A. It's probably one of the largest papers in Connecticut.

Q. Do you know if it is the largest paper in Connecticut?

A. No, I don't.

Q. Now do you know if the circulation of the Hartford Courant covers Newington, Hartford and New Britain?

A. Yes, I do.

Q. How do you know that?

A. They tell you. I assumed they do.

Q. Who is they?

A. I assumed that the Courant covers those areas.

Q. Did you have any discussion with the circulation manager or anyone in circulation? No?

A. No, I didn't.

Q. At some point in time the union changed from focusing on the employees of the Newington store to the general public, did it not?

A. Yes, it did.

Q. And can you tell us when that was?

A. August 7th.

[79] Q. And can you tell us why that was?

A. No, I can't, sir.

Q. Now what happened on August 7th?

A. We had employees go to the store with signs on, explaining to the public that this was a non-union store.

Q. And were you present on the picket line?

MR. MEIKLEJOHN: I'm going to object at this point, Your Honor. Again, the occasions which they attempted to enter the parking lot and were barred from the parking lot, occurred prior to August 7, 1987.

The issues in this case, at least with respect to access, concern the leafleting of employees' cars, and the period in which the campaign was focused on employees. We are not confronted with any allegation of a refusal to allow access, or barring them from the premises for the purposes of communicating with the general public.

They didn't attest that issue, and that issue is not in court. We are focusing solely on —

JUDGE BIBLOWITZ: (Interrupting) What's the relevance of what occurred? As you stated in your opening statement, there was picketing directed towards the general public, beginning August 7th, I believe, but there is nothing in the complaint. Why do I want to hear this?

MR. JOY: Well, Your Honor, I believe it's relevant from several points of view. But the primary point of view [80] is the fact that the intended audience changed may bear on remedy.

The general counsel is arguing that there were instances, two instances, where these individuals were not allowed on the parking lot. As a remedy, he is seeking an order allowing them on the parking lot. I would argue that at some point in time they changed their intended audience to the general public, and abandoned directing it towards the employees. And, therefore, any order, if one were ever entered, would be limited in time to the point in time where they changed their intended audience.

I believe I have the right to establish that point in time, and I have the evidence to do so. And if allowed to examine this witness, I would be able to show that all of actions taken after August 7th were directed toward the general public.

Furthermore, I would state that these picketers were allowed to go up on the grassy area that came up to the employee parking lot without interruption for eight months. They certainly could have picketed aimed at the employees right there, and had that message focused right on the employees. They chose not to do that. I think that bears on the intended audience, which is one of the factors under the Fairmont doctrine to be considered in weighing the strength of the Section 7 right asserted.

[81] So, therefore, I would say that the Section 7 right asserted changed from organization to informational. And that bears on a whole host of issues, not the least of which is the potential remedy in this case.

JUDGE BIBLOWITZ: I disagree. The mere fact that they may have engaged in, or did engage in such activities beginning August 7th does not mean that if I should find a violation here, they're not entitled to a remedy because they changed their audience on a certain date.

They may have changed it for whatever reason, but that makes no difference.

Let's go on. So sustained.

MR. JOY: Note my exception.

BY MR. JOY:

Q. Now, Ms. Meucci, you indicated in your affidavit that a meeting was called, a union meeting was called in September, did you not?

A. Yes.

Q. And was that a meeting for the purpose of getting Lechmere Newington employees to attend?

A. No, I don't think so.

Q. Were employees invited?

A. No.

Q. In your affidavit, this is on page 2, you state that at least two people did not show up for a union meeting in [82] mid-September. Does that refresh your memory as to whether there was a union meeting?

MR. GAGNE: Objection, Your Honor. I wonder if he could show her the whole affidavit rather than just reading from it.

JUDGE BIBLOWITZ: Show it to her. The question is: does that refresh your recollection as to whether the September meeting was a union meeting for employees, for Lechmere employees or associates?

THE WITNESS: I'm not in charge of every meeting. This could have been for employees.

JUDGE BIBLOWITZ: Could have been for employees?

THE WITNESS: It sounds like it was.

JUDGE BIBLOWITZ: That's your affidavit? Correct?

THE WITNESS: Yes.

JUDGE BIBLOWITZ: After looking it over what's your best estimate? Was that a meeting for Lechmere employees, or was that some other type of meeting?

THE WITNESS: I believe it was for three Lechmere employees.

BY MR. JOY:

Q. And how many home visits did you personally make?

A. Approximately ten.

Q. How many telephone calls did you make?

A. Approximately eight or nine myself.

[83] Q. Did you keep a log of those telephone calls?

A. Not a log. On the sheets I would just put if I reached someone, if they were home, if I spoke with the employee.

Q. And how many telephone calls did Mr. Looke make? Do you know?

A. I'm not sure.

Q. Do you know if he kept a log?

A. No.

Q. Did he report to you the results of his attempts to make telephone contact?

A. If he made any contact he would have put them in the book, put them in the book also.

Q. Now you indicated that your efforts were frustrated in part because parents would intervene? Is that correct?

A. Yes, it is.

Q. How many times did parents intervene?

A. Approximately eight times.

Q. And is that indicated in the notebook as well?

A. Yes.

Q. After the names and addresses were put into the union computer, were there address labels printed out?

A. Yes.

Q. Were mailings sent to these 41 people?

A. Yes.

[84] Q. How many mailings were sent to these 41 people?

A. Approximately four.

Q. Four to each one of the 41 people?

A. Yes.

Q. And did any of these mailings contain a return self addressed — strike that.

A return envelope or postcard with no postage necessary, addressed to the union?

A. Yes.

Q. And how many did you receive?

A. One.

Q. But each employee of the 41 got four?

A. Yes.

JUDGE BIBLOWITZ: At least four was sent to the individuals, but I don't know if whe [she . . . they] can testify that she received them. Is that correct?

THE WITNESS: Yes.

BY MR. JOY:

Q. Did you ever receive back any of the envelopes that you sent addressed to these employees, stating address unknown, or addressee no longer here?

A. Not to my recollection.

Q. Would that be indicated in your notebook?

A. No.

\* \* \*



[86] Q. I show you a set of documents that has been marked as Respondent's Exhibit 1a, b and c, Ms. Meucci, and I ask [87] you if you can identify that information for me?

A. Yes, that is literature we would send out.

Q. Is that an example of the kind of literature you were sending to Lechmere employees?

A. Yes.

Q. Is the address label addressed to a Joseph Downs?

A. Yes.

Q. Is he one of the Lechmere employees that you had on your list of names and addresses?

A. I don't recall.

\* \* \*

Q. Ms. Meucci, did you handbill at Lechmere on June 23, 1987?

A. I believe we did.

Q. Now, Ms. Meucci, could you tell me what handbilling in the Lechmere parking lot would have done for your organization effort that picketing on the grassy area did [88] not?

\* \* \*

BY MR. JOY:

Q. The union picketed on the grassy area from August until March, August of 1987 until March of 1988? Correct?

A. Correct.

Q. And that grassy area borders on the section of the parking lot where the employees park? Is that correct?

A. Correct.

\* \* \*

[89] Q. Of the 41 names that you mailed literature to, do you recall where they were located geographically?

A. The towns surrounding Newington: Wethersfield, Hartford, New Britain, Newington.

Q. What was the furthest away address that you mailed to? Do you recall?

A. Wethersfield.

Q. And is Wethersfield contiguous with Newington?

A. Yes.

\* \* \*

[91] *Redirect Examination*

[92] BY MR. MEIKLEJOHN:

Q. When you went to the parking lot to place leaflets on cars, did you ever vandalize any cars?

A. No.

Q. Did you break into any cars?

A. No, we didn't.

Q. Did you threaten anybody?

A. No, we didn't.

Q. Did you insult anybody?

A. No.

Q. Did you hit anybody?

A. No, we didn't.

Q. Did you shake baseball bats at anybody?

A. No, we didn't.

Q. Carry any weapons?

A. No.

\* \* \*

*Redirect Examination*

BY MR. MEIKLEJOHN:

[95] Q. Do you recall going onto the premises of the [96] Lechmere Plaza parking lot or performing any other functions on that parking lot other than those connected with distributing leaflets or picketing?

JUDGE BIBLOWITZ: What day?

MR. MEIKLEJOHN: During the summer of 1987.

A. Yes. I used the telephone to call in to my office.

Q. And where are those telephones that you used? Are those the telephones that we stipulated are —

A. They're on the Lechmere property. Not the Lechmere property, but if you come down past Come Place, and come in the side driveway, and go to the back of the plaza, they're in the plaza. They're right in front of Card Gallery.

Q. That's right in the middle of the building that's labelled "Plaza"?

A. Yes.

Q. Is there any way to get to those phones without going through the parking lot, or some portion of the parking lot?

A. No.

MR. MEIKLEJOHN: That's all I have, Your Honor.

JUDGE BIBLOWITZ: Anything further, Mr. Joy?

*Recross Examination*

BY MR. JOY:

Q. How many public telephones were there at the time you attempted to use the one that you did? Do you recall?

[97] A. Two.

Q. Were they both in operation at that time?

A. Yes.

Q. Do you happen to know what store the other one is in front of?

A. No, I don't.

Q. If I told you Radio Shack, would that serve to refresh your memory?

A. No.

Q. Do you remember Radio Shack being open at the time?

A. No. I only remember four stores being open at that time.

Q. Do you remember that one was not a Radio Shack?

A. I don't recall.

Q. By the way, running in front of that strip of stores that is marked "Plaza" on the map, is there a road? Do you recall?

A. Part of the parking lot.

Q. Did you recall a road?

A. I don't recall a road. I just recall another part of the parking lot.

Q. Was that plaza under construction when you went to use that telephone?

A. No, it wasn't.

Q. That was in June of 1987 you used the telephone?

[98] A. Yes.

MR. JOY: I have no further questions, Your Honor. But at this time I have a written request for a subpoena duces tecum addressed to yourself requesting the issuance of the subpoena duces tecum to Lisa Meucci, to bring "any log book, notebook or other. . . ."

JUDGE BIBLOWITZ: Don't tell me what you want. You have to fill out the subpoena. I will give you a subpoena shortly.

\* \* \*

[103] MR. MEIKLEJOHN: General counsel calls Giovano Cassarino.

Whereupon,

GIOVANO CASSARINO

\* \* \*

[104] *Direct Examination*

BY MR. MEIKLEJOHN:

Q. Mr. Cassarino, by whom are you employed?

A. By United Food and Commercial Workers, Local 919, Hartford, Connecticut.

Q. What is your position with Local 919?

A. Business agent/organizer.

\* \* \*

Q. Drawing your attention to June 20, 1987, which was a Saturday, do you remember what you did that morning?

A. Yes, we met in the parking lot with some other three employees from the local.

\* \* \*

[106] Q. What happened when the policemen came?

A. He asked what we were doing. We said we were on state property. Just to talk to employees going to work. He didn't see nothing wrong with that, so he went to talk to the manager. After a while he came back to us, and he said: "There's nothing we can do about it because you are on state property. We cannot make you leave. The only thing is you'd better watch your back because of the traffic." Which is there's a lot of cars going by, about 50 mile an hour they're going by.

Q. Did you go to the property on any other days to leaflet cars?

A. Yes, I want [went] inside when we handbilled the parking lot.

Q. When you handbilled the parking lot on the 18th did you physically hand a leaflet to an employee?

[107] A. Yes, I did, one employee.

Q. And did you see what happened to the leaflet that you handed to the employee?

A. Yes, the employee was walking towards the entrance to the store. One of the security guards, which was a woman, grabbed the paper from the guy's hand.

MR. MEIKLEJOHN: That's all I have from this witness.

\* \* \*

[114] MR. MEILEJOHN [MR. MEIKLEJOHN]: General counsel calls Mark Espinosa. Whereupon,

MARK ESPINOSA

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

\* \* \*

Q. Mr. Espinosa, by whom are you employed?

[115] A. United Food and Commercial Workers Union, Local 919.

Q. What is your position with Local 919?

A. Business rep.

Q. How long have you held that position?

A. That position since January 2, 1986.

Q. Were you employed by Local 919 before that?

A. In years past, in a different capacity.

Q. Drawing your attention to June 20, 1987, what did you do that morning?

A. I arrived in the vicinity of the store, I should say across the street from the Berlin Turnpike. Parked at the Bradlee's Department Store, and met my fellow workers.

\* \* \*

[118] Q. What happened after the police got there?

A. The police asked us what we were doing, who we were. They did take information down about us, the representatives from the local. They — we said we were not intending to cause any problems, we felt we had a right to be somewhere, and we were here to distribute the information. But that if we were told to leave we would leave, because these were the instructions we were under.

At that point the police, I believe it was the sergeant, he left and walked away and spoke with the main man.

[119] Q. You say the main man?

A. The main man from the company there, Mr. Samuelson. And we stayed by, just waiting for a response. And it was a brief time, I don't know how long. A minute or two minutes maybe. And they came back, the police officer came back to us, and told us that indeed we did have a right to be there.

I remember very specifically he said: "As long as you have a right to be within ten feet from the curb." He did state that the traffic was a problem on the Berlin Turnpike, the speed of the traffic was a problem. He cautioned us. He had stated that there was a policeman hit on that highway very recently before that, and so he said he did not want us causing a public nuisance. I remember that.

We said we did not intend to. I believe that's all there was. That's all I can remember, I believe.

\* \* \*



[124] MR. JOY: I think we may have an objection, and I think I may need to make an offer of proof on this. I want to ask Mr. Espinosa some of the same questions I asked, or the same questions I asked Ms. Meucci, with respect to entering into the Lechmere premises.

JUDGE BIBLOWITZ: Premises of the store?

MR. JOY: Into the Lechmere store itself. I have a series of those questions. I anticipate counsel for the general counsel's same objection, and I will make an offer of proof, incorporating by reference all of the reasons previously stated, if that procedure is acceptable to counsel.

JUDGE BIBLOWITZ: I assume you would object?

MR. MEIKLEJOHN: I will make the anticipated objection.

JUDGE BIBLOWITZ: I can say I would rule the same way I did before.

BY MR. JOY:

Q. Mr. Espinosa, at any time did you go inside the Lechmere store to solicit or handbill?

MR. MEIKLEJOHN: Objection.

MR. GAGNE: Objection.

JUDGE BIBLOWITZ: Sustained.

MR. JOY: Let the record reflect that the counsel intends to ask the same questions.

JUDGE BIBLOWITZ: Okay, you have the offer of proof made to Ms. Meucci.

[125] MR. JOY: And I would like to, at this juncture, for the record, incorporate by reference all of the reasons stated in my earlier offer of proof. And if counsel is satisfied, I will incorporate by reference all the questions I asked of Ms. Meucci, relating to being inside the premises, to Mr. Espinosa.

\* \* \*

[126] MR. MEIKLEJOHN: Now general counsel calls Joseph Clifford Gagnon.  
Whereupon,

JOSEPH C. GAGNON

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

\* \* \*

Q. Mr. Gagnon, by whom are you employed?

A. United Food and Commercial Workers Union, Local 919.

Q. What's your position with Local 919?

A. Recording secretary.

\* \* \*

[134] MR. JOY: Your Honor, here again, I'm notifying Your Honor and the parties that I would like to ask Mr. Gagnon whether he was inside the store distributing literature, and I would repeat all the questions that I asked Ms. Meucci. And I'm assuming counsel for the general counsel's objection, and counsel for the charging party's objection, Your Honor's ruling, and my offer of proof [135] incorporated by reference to everything I said earlier.

JUDGE BIBLOWITZ: The record will reflect that all that happens.

Assume all that happens, maybe we can save the time. My ruling will be the same. I'm sure Mr. Meiklejohn's objection will be the same, and your offer of proof will be the same?

MR. JOY: That's correct, Your Honor. I'm sure the parties will stipulate to that procedure.

JUDGE BIBLOWITZ: I'm sure.

MR. MEIKLEJOHN: It's fine with me.

MR. GAGNON: It's fine with me, Your Honor.

BY MR. JOY:

Q. Mr. Gagnon, did Mr. Samuelson, or did any other representative of Lechmere ever instruct you to get off that grass area at any time after the incident to which you just testified just now?

A. No.

Q. And did you yourself picket on that grass area at any time after this day in question?

A. Yes.

Q. Could you tell me how often you picketed on that grass area yourself?

MR. MEIKLEJOHN: I'm going to object. We have an understanding, first, that the fact that something has been [136] stipulated to does not prevent — is not meant to prevent the parties from educating [adducing] additional information. Nevertheless, for the reasons I objected to testimony regarding the contents of picketing after August or whatever the date is, to any additional testimony or questioning regarding the events of August and thereafter.

JUDGE BIBLOWITZ: Sustained.

MR. MEIKLEJOHN: We're not complaining they were kicked off the property after that.

JUDGE BIBLOWITZ: You have the witness's testimony that anything after that is irrelevant.

MR. JOY: Just let me state my position with respect to this testimony, and let me make an offer of proof.

If allowed to ask the witness, I would assume his testimony would be that he did engage regularly in the picketing that took place over the eight month period on that grass area. And that relates back to this incident on the 20th, from the point of view that if a violation took place at all on the 20th, because of Mr. Samuelson's alleged instruction to these people, thinking that they were on Lechmere property when they weren't, then it was derimonous [de minimis] that it had no effect whatsoever, no significant effect certainly, on their ability to use that property for their Section 7 purposes.

And, therefore, I want to merely use it as [137] corroborative, to support my argument, which I will make later in a briefing, that this was at best a technical violation, an instruction that the union, by its own admission, ignored. And that's corroborated by the fact that they were allowed to patrol the premises.

JUDGE BIBLOWITZ: I'll sustain the objection.

. . .

[140] JUDGE BIBLOWITZ: Okay. First witness?

MR. JOY: Yes, Your Honor, I'd like to call Roger Samuelson.

. . .

[141] *Direct Examination*

BY MR. JOY:

Q. Mr. Samuelson, I direct your attention to the document which has been marked Joint Exhibit 2, which for the record is the map so-called of the Lechmere Plaza. Is that correct?

A. Yes, that's correct.

Q. Can you tell us if the Lechmere store is connected to the strip of satellite stores identified as the plaza in Joint Exhibit 2?

A. No, it is not. There is a truck roadway in between both areas, and it's approximately 112 feet from building to building.

Q. Would you describe for the Administrative Law Judge [142] and the record, what the opening is at the very south side of the property?

A. Okay, yes. On the very far left hand side of the exhibit, by the front grass area, there's a turnoff lane which is a one way lane, which enters behind the building, which is exclusively for trucks and delivery services such as UPS, etc.

Q. Does that road go behind the Lechmere store?

A. Yes, it does.

Q. Is there a loading dock in back of the Lechmere store?

A. Yes, that's correct.

Q. Would you identify that loading dock for the record, please?

A. Yes, should I mark it with a D?

JUDGE BIBLOWITZ: Why don't you make it LD?

A. Right on the corner of the triangle?

Q. Yes.

A. Right above where it says Lechmere. LD is loading dock.



Q. Are there parking lots that surround the Lechmere store?

A. Parking spaces?

Q. Yes, parking spaces.

A. Yes, there are.

[143] Q. Would you describe the parking space which is to the east side of the Lechmere store?

A. The east side being —

JUDGE BIBLOWITZ: Below the —

A. Below the building?

Q. Yes.

A. Between —

Q. The Berlin Turnpike. Right.

A. That is the pick up area.

Q. Is that designated as a pickup area?

A. No. There is a sign on the building itself that says "pick up area". It is not as descriptive to some customers, but generally the customers know that that is where they pick up the merchandise.

Q. Tell us what the customers do if they need to pick up some merchandise?

A. Well, basically the ones that have experienced the shopping experience before, will know if they are going to buy a large ticket item, that they will park back there initially, go inside, make their purchase, go to our pick up counter, get the merchandise, and get help to put it in the car.

For those customers that are doing it perhaps for the first time, they may park out in the front area, go in, make their purchase, and find that they will have to pull back by [144] the pick up area, to the associate that they dealt with, and then pick up their merchandise from there.

Q. Now are associates asked to go in a certain entrance of the store?

A. Yes, they are. All the associates are asked to go into the pick up area entrance itself, and prior to store hours that is the only door that is open.

Q. How many doors to the store are there? That allow for access by shoppers?

A. By shoppers?

Q. Entrances I guess.

A. Well, there are two entrances. There are four doors at each entrance, one automatic in, one automatic out, and the two middle ones for whichever the flow may be.

Q. Now we have stipulated to the fact that there is a no solicitation/no distribution policy, Mr. Samuelson, and also stipulated to the fact that that was promulgated in 1982. Can you tell me whether or not you have had occasion to enforce that policy in the past year or year and a half since the store has been opened?

A. Yes. Since the store has opened in November of 1986, I can recall specifically at least [least] four occasions where I've had to enforce the no solicitation policy.

Q. Tell us, if you can recall, when the first occasion was?

[145] A. The first occasion was probably just a few days or first week into the grand opening, when the AAA Automobile Association located in West Hartford, Connecticut, someone had come into the parking lot and taken these sign up cards and put them on the windshields of cars, both employees and customers.

Q. What, if anything, did you do in response to that?

A. At that point in time I did not, nor did any of my people, see the individuals placing the leaflets on the windshields. But as soon as it was reported I had all the leaflets removed.

MR. GAGNE: Objection, Your Honor, move to strike. Based on hearsay.

JUDGE BIBLOWITZ: Overruled. As soon as you found out about it did you tell your people to do anything?

THE WITNESS: I instructed one of our people to remove the brochures from the windshields and bring them to me.

BY MR. JOY:

Q. And did you do anything else?



A. Yes. Once I found out who it was from I then looked up in the phone book their telephone number, and called the branch in West Hartford, found out who the branch manager was, his name was Paul Windsor. And I spoke to him on the telephone.

Q. What did you tell him?

[146] A. I explained that we had a no solicitation policy, and that I couldn't allow any of his people on our property for the purpose of soliciting or distributing handbills.

Q. What, if anything, was his response?

A. He apologized for the incident, and said "this is a fairly common occurrence." Being new to the area, in other words we had just opened, he didn't know what our policies were, and apologized for it to happen, and said he would put us on, I guess, his "no distribute" list.

\* \* \*

Q. When, if you can recall, was the next occasion you had to enforce the no solicitation/no distribution policy?

A. I had a phone call around the Thanksgiving period of 1986, again just a short period after we were opened, the Salvation Army had called and wanted to know if they could one of their bell ringers, one of their Christmas bell ringers, by our entry during our Christmas season. I had to tell them no, again based on our no solicitation policy. And wished them well with their campaign, but it would have to be not on Lechmere property.

Q. I take it they did not send any bell ringer to Lechmere [147] property?

A. That is correct. They respected our wishes, and abided by our rules.

Q. When, if you can recall, was the next occasion when you had to enforce the no solicitation/no distribution no access policy?

A. The next occurrence happened later in February of 1987. I had discovered that some Burger King coupon brochures had been placed on the windshields of the cars, and our

people brought me the brochures so I could identify who it was. There were two Burger Kings listed on there. I called one of them and asked for the manager on duty, and also explained to him that we had a no solicitation policy, and that I would have to prohibit him in the future from distributing such material?

Q. Did he have any response?

A. He apologized for the incident, and said: "Don't worry about it, we won't be back to do that."

\* \* \*

Q. I show you, Mr. Samuelson, a document which has been marked Respondent's Exhibit 2, and I ask you if you can [148] identify it, please?

A. Yes, that is one of the brochures that were placed on by the Burger King people.

\* \* \*

Q. Does this document contain a date?

A. Yes, it does. Right on the bottom it says "offer expires February 28, 1987."

Q. Does it contain some handwriting on the top of it?

A. Yes, that is my handwriting on the top.

Q. Could you explain what is meant by the handwriting on the top?

A. I just made a notation that I had called Burger King [149] on 3/3.

Q. 3/3 what?

A. 3/3/87. To register my complaint about the distribution of the handbill.

Q. And why did you write windshield on there?

A. Because they were placed on the windshields of cars, and it was just a notation I made to myself at the time.

\* \* \*

JUDGE BIBLOWITZ: The 3/3 date that you called Burger King, was that the date that you first noticed these coupons on the windshields?

THE WITNESS: No. I believe it was like the next day or the day after.

JUDGE BIBLOWITZ: Okay, so like a day before. Did it occur to you that it was kind of strange that they left these coupons on the windshields after the offer expired?

THE WITNESS: As a matter of fact it did. I really thought to myself that they had had an overrun of coupons, and just on the last minute they wanted to distribute them and get them distributed out into the area.

\* \* \*

*Voir Dire Examination*

BY MR. MEIKLEJOHN:

Q. You testified that you found these on the windshield [150] yourself or someone else?

A. As I recall, I think a couple of people had found them. I found one on my windshield as I was going home that day, and others were collected and put on my desk.

Q. Do you know if this is the one you found on your windshield?

A. Yes, it was.

Q. And when you got it that's when you wrote the word "windshield" on it?

A. No, I knew that from when I got back to work a day or two later, that that's where it was, and that's when I wrote the date on and made a contact on the phone.

Q. So you wrote windshield and the date at the same time?

A. No, I believe they were two different times.

Q. When did you write windshield on there?

A. I don't remember exactly. It could have been as I got in my car to go home. I just wrote that it was on my windshield, and placed that on the seat of my car and dealt with it a day or two later. Or it looks like I used a different type pen to write the date when I called to complain about the solicitation.

Q. When did you cross out the date?

A. When I had made a tangible contact with somebody at Burger King, and they said they would stop, they would not [151] do it again.

Q. When you first called you didn't get a hold of anyone?

A. Have you ever tried calling a Burger King and asking for the manager on duty?

Q. The first time you called was March 3, 1987?

A. That's right.

Q. Did you speak to anyone in authority there?

A. Yes, I asked for the manager on duty. He gave me his name. I don't recall his name, and I did not write down his name.

Q. He told you that he wouldn't let it be distributed again?

A. That's correct. He sounded like someone who was in charge, as opposed to somebody just making french fries, or whatever else they do.

Q. How many times did you call before you talked to him?

A. Just once.

Q. When did you write the date 3/3/87 on there.

A. When I sat down to make the call. As I'm dialing I just put that date down.

Q. When did you scribble the date off?

A. After I knew I had talked to somebody, and felt comfortable that I had done my job.

[152] Q. You only had to place one call before that happened?

A. I was very lucky on this one. Yes.

Q. So how long elapsed between the time you wrote the date and the time you scribbled over the date?

A. It was the same phone call. It was a minute. I remember having to wait a minute to probably two minutes for the manager to come to the phone. He was not the person who answered the phone, but it was within minutes.

MR. MEIKLEJOHN: I'm going to object to this document, Your Honor. I think there are considerable circumstances which draw the authenticity of the document into

question. First is the fact that it was apparently — the witness is claiming that the document was distributed after the offer had expired.

The second is the unexplained circumstances with respect to the date the witness [witness] claims he wrote the date down when he made the phone call, and then crossed the date out a matter of minutes later. An examination of the original document will disclose that those two actions were also taken supposedly with two different pens.

I think there is considerable question as to whether this document was actually placed on employee windshields or not, as alleged by the witness.

\* \* \*

[153] JUDGE BIBLOWITZ: Okay, received as Respondent's 2.

\* \* \*

BY MR. JOY:

Q. Had there been another time when you had to enforce the no solicitation/no distribution/no access rule, to the best of your recollection, Mr. Samuelson?

A. Yes, I distinctly remember another situation.

Q. Can you tell us about that?

A. It was further into the springtime, and the only way I knew the date, because I did not record it, was that the weather was better out, and there were two Girl Scouts outside selling cookies. I had to ask the two Girl Scouts to leave the premises, and explained that we had a no solicitation policy to them. And they did leave.

Q. To your knowledge, have there been any other instances where representatives of Lechmere have had to enforce the no distribution/no solicitation/no access rule?

[154] A. Yes, there have been.

Q. Can you tell us, to the best of your recollection, those other instances?

A. I know our assistant store manager, Steve Mittler, has on a couple of occasions had to deal with that circumstance also.

\* \* \*

JUDGE BIBLOWITZ: Okay, in an off the record discussion Mr. Joy proposed a stipulation to Mr. Meiklejohn. Mr. Joy, do you want to put that proposed stipulation on the record, and [see] how Mr. Meiklejohn, on the record, responds?

MR. JOY: I would, Your Honor. The stipulation is as follows:

At no time did the employees of the respondent engage in handbilling or picketing at the Lechmere, Newington location, either on the public way or on Lechmere property.

MR. MEIKLEJOHN: I can stipulate to that. Yes.

MS. COLLINS: I can stipulate, Your Honor.

JUDGE BIBLOWITZ: And you are?

MS. COLLINS: I am Barbara Collins. I am a substitute this morning for Attorney Gagne.

JUDGE BIBLOWITZ: Okay, Barbara, B-a-r-b-a-r-a?

MS. COLLINS: Yes, that's correct.

JUDGE BIBLOWITZ: And Collins, C-o-l-l-i-n-s?

MS. COLLINS: That is correct.

JUDGE BIBLOWITZ: Are you associated with Mr. Gagne?

MS. COLLINS: Yes, I am.

JUDGE BIBLOWITZ: And you will stipulate on behalf of the charging party?

[161] MS. COLLINS: That is correct.

JUDGE BIBLOWITZ: Shall we continue with the direct examination?

MR. JOY: Thank you, Your Honor.

JUDGE BIBLOWITZ: Of Mr. Samuelson.

#### *Direct Examination*

BY MR. JOY:

Q. Mr. Samuelson, when we closed yesterday I was examining you on the subject of examples of the enforcement of



the no solicitation/no distribution/no access rule. Do you recall that?

A. Yes I do.

Q. Now, in addition to the testimony you gave yesterday, were there other occasions when you had to enforce that rule?

A. Yes, there were several.

Q. Can you tell me when they were?

A. Not specifically. We would have a lot of various phone calls that would come into my office, requesting either from a church bake sale, "can we hold a raffle out front?" You know, raffling off a car for various organizations. Our general response to every one of them was: "No, I'm sorry. No, you can't," and wish them well with their campaign, but they would not be able to solicit on our property.

Q. Was there a time when those requests were more [162] frequent than not?

A. They were extremely frequent once we opened. You know, being new in the neighborhood, which was back in the November, 1986 period, I suppose everybody recognized the fact that here is a brand new store: "Let's see if . . ."

MR. MEIKLEJOHN: Objection.

JUDGE BIBLOWITZ: Just testify to what you saw directly rather than what you assume.

THE WITNESS: Okay.

A. I saw a larger proportion of requests once we had first opened.

Q. Now has anyone ever been allowed to handbill or solicit in the parking lot at the Lechmere Plaza?

A. No, not to my knowledge.

Q. Now there's a stipulation that has been entered into the record, which describes the ownership of the entire parking lot, and it mentions Newington Associates and Conover [Konover] Management. Can you, for the benefit of the Judge and the record, tell us by looking at Joint Exhibit 2 where roughly the property line is running through the parking lot?

A. Yes, I can. Pointing out to the Judge, there is a retention basin in the back corner.

JUDGE BIBLOWITZ: That's right where the exhibit number is, in the top left hand corner of the exhibit, just to the [163] left of where it says "Plaza"?

THE WITNESS: That's correct. Just where the 35 is. It is not a straight line to the front corner, but it is a jagged line that goes through the parking lot to this corner.

JUDGE BIBLOWITZ: So you're talking about from the top left hand corner to the bottom?

THE WITNESS: To the bottom right hand corner.

JUDGE BIBLOWITZ: And a jagged line?

THE WITNESS: A jagged line. Yes. Similar to that.

JUDGE BIBLOWITZ: Thank you.

BY MR. JOY:

Q. Did Lechmere ever inquire with Conover [Konover] what their position was with respect to no solicitation/no distribution/no access to the parking lot?

A. Yes, we did.

Q. Can you tell me when that was?

A. The exact date I don't recall.

Q. Did we [sic] ever receive a letter from Conover [Konover] Management?

A. Yes, I received a letter of authorization from Conover [Konover] to enforce the no solicitation property on their property as well.

MR. JOY: I'm going to ask to have the document marked.

JUDGE BIBLOWITZ: Respondent's 3?

[164] MR. JOY: Respondent's 3.

JUDGE BIBLOWITZ: Okay. Respondent's 3 has been marked.

(Whereupon Respondent's Exhibit 3 was marked for identification).

BY MR. JOY:

Q. Mr. Samuelson, I show you a document that has been marked Respondent's Exhibit 3. And I ask you if you've seen that document before?

A. Yes, I have.

Q. Is that a copy of a letter which Lechmere received from Conover [Konover] Management?

A. That is correct.

\* \* \*

[165] MR. JOY: Yes, I'll move the exhibit into the record at this time, Your Honor.

JUDGE BIBLOWITZ: Any objection?

MR. MEIKLEJOHN: No objection.

JUDGE BIBLOWITZ: Received as Respondent's 3.

\* \* \*

Q. Mr. Samuelson, did anyone at Lechmere, including yourself, ever have to exercise the authority that Conover [Konover] granted on behalf of Conover [Konover]?

A. No, we did not.

Q. Now does Lechmere have a booklet entitled "Welcome [166] to Lechmere"?

A. Yes, we do.

Q. And is that booklet given out to employees?

A. To every associate that is hired.

Q. When is it given out?

A. During their orientation.

Q. Would you describe what the booklet is, and what it's intended to be?

A. It gives the associate all the rules and guidelines and general policies and procedures of the company. They are allowed to take that booklet home, and if they have any questions or any issues with any of the pieces of that, we freely ask them to come back and ask what they may not understand.

Q. And is the no solicitation/no distribution/no access policy contained in that "Welcome to Lechmere" booklet?

A. Yes, it is. I believe it's page 9.

MR. JOY: Your Honor, I'm going to have marked at this point a copy of the "Welcome to Lechmere" booklet. I have page 9 duplicated. I've previously supplied general counsel with a couple of copies. What I'd like to do is have marked for

the record, and later I will move to introduce this, page 9 rather than have the whole thing reduplicated.

\* \* \*

[167] JUDGE BIBLOWITZ: The associate's booklet has been marked as Respondent's 4.

BY MR. JOY:

Q. I show you the document that's been marked Respondent's Exhibit 4, Mr. Samuelson, and I ask you if this is one of the copies of the "Welcome to Lechmere" handbook to which you were referring a few moments ago?

A. Yes, it is.

Q. Would you refer to page 9, please? Is that the no solicitation policy to which you were referring a few moments ago?

A. Yes. The policy in the upper left hand corner.

MR. JOY: Your Honor, I move this exhibit into evidence.

JUDGE BIBLOWITZ: Any objection.

[168] MR. MEIKLEJOHN: No objection.

MS. COLLINS: No objection.

\* \* \*

Q. Mr. Samuelson, are employees required to acknowledge the receipt of that booklet?

A. Yes, they are. There is a separate page that actually goes into the book, that they acknowledge with, and it's placed in their personnel file.

MR. JOY: Your Honor, I'm going to have marked at this point, as Respondent's Exhibit 5, an acknowledgement of the receipt form.

JUDGE BIBLOWITZ: Okay, thank you. 5 has been marked. Show it to the witness.

\* \* \*

Q. Mr. Samuelson, I show you the document which has been marked for identification as Respondent's Exhibit 5, and ask you if this is a copy of the acknowledgement of receipt form that you earlier described?

[169] A. Yes, it is.

Q. And this is the form employees are required to sign upon receipt of the copy of the booklet: "Welcome to Lechmere"?

A. That is correct.

MR. JOY: Your Honor, at this time I move this exhibit into the record.

JUDGE BIBLOWITZ: Any objection?

MR. MEIKLEJOHN: It's on relevance, Your Honor. The individuals whose concerted Section 7 activities we're concerned with, we just stipulated were not employees of respondent, and therefore, would not have received either the handbook or the acknowledgement of receipt.

JUDGE BIBLOWITZ: The relevance, if there is any, is — it's fairly relevant. I'll receive it.

MR. JOY: Your Honor, just in response, I will briefly state that this is offered to show how seriously this employer took this policy, and how widely spread it communicated that policy.

JUDGE BIBLOWITZ: It's been received, Respondent's 5.

\* \* \*

Q. Mr. Samuelson, is there a purpose for the no solicitation/no distribution/no access policy?

A. Yes, the purposes of the policy is to keep illegal trespassers off the property. It's to keep people from harrasing our customers. It also, due to any solicitations, may cause a confrontation in the parking lot, a broken windshield, or assault and battery charges, and any unlawful trespassers.

\* \* \*

Q. Is there any other reason for the policy?

A. It would also greatly reduce our legal liability, by assuring that no illegal actions were taking place in the parking lot.

Q. Now with respect to the premises themselves, is Lechmere the largest store in that plaza?

A. Yes, by far.

Q. How much larger is Lechmere than any of the other stores in the plaza, would you say?

A. I believe the Card Gallery Store is about 5,000 square feet, give or take a couple of hundred. [L]echmere is approximately 70,000 square feet, so significantly larger than the largest store in the plaza.

[171] Q. Going back for a moment to the no solicitation policy, and your testimony with respect to the purpose for which that policy was promulgated, did the company receive any complaints from customers about the handbilling that the union engaged in?

A. Yes, there were some.

Q. And did the company receive any complaints from employees?

A. Many more. Yes.

Q. When you say many more, can you give me roughly an idea of how many you mean by that?

A. A couple of dozen complaints from the associates.

Q. Getting back to the premises, is there any place in front of the Lechmere store on the west side closest to the plaza for shoppers to mingle?

A. No, there is not.

Q. Are there any benches in front of the Lechmere store?

A. No, as a matter of fact there's no benches or chairs inside or outside the store.

Q. And do you have any perception of the amount of interchange of customers running between the Lechmere store and the other stores in the plaza?

A. It's basically minimal.

Q. Are there any restaurants in the plaza?

[172] A. No, there are not.

Q. Are there any bars in the plaza?

A. No.

Q. Are there any convenience stores in the plaza?

A. No.

Q. Are there any ice cream parlors in the plaza?

A. No.

Q. No restaurants of any kind?



A. None.

Q. Getting back to the period of June and July of 1987, there is a stipulation on the record that only four stores were opened at that period of time. Do you know if one of them was Radio Shack?

A. Radio Shack was not one of them that was opened at that time.

Q. Do you know when Radio Shack opened?

A. I believe it was around the November, 1987 period.

Q. You were here yesterday for testimony of Ms. Lisa Meucci, were you not?

A. Yes.

Q. Did you hear her testimony as to the public telephones?

A. Yes, I did.

Q. Did you hear also that there was a stipulation entered into the record that there were two public payphones in the [173] plaza?

A. Yes, I did. I recall one being by the current Radio Shack, and one being by Card Gallery.

Q. In June or July of 1987, do you know whether that pay phone in front of Radio Shack was operational?

A. I don't know that. No.

Q. But Radio Shack was not open at that time?

A. Radio Shack was not there.

Q. Was the road in front of the plaza at that time under construction?

A. Yes, it was.

Q. Would you describe the approach down the Berlin Turnpike heading south to the Lechmere Plaza?

A. All right. If you were to back up let's about a half mile away from Lechmere, and driving south on the Berlin Turnpike, your basic view — it's an uphill drive. Your basic view of the stores, including Lechmere, is very limited. As a matter of fact, the sign on Lechmere across the front is just about the only piece of the entire plaza that you can see as you're coming up that rise.

Q. Do you know how far from the Berlin Turnpike these two public pay phones are?

A. Probably eight to nine hundred feet.

Q. Are they visible from say 500 yards away from the entrance to the Lechmere Plaza?

[174] A. No, I don't believe so.

Q. When can you first view them?

A. Well, they're in such a position that you don't even really see the plaza until you're right alongside or parallel to the Berlin Turnpike, where you would have to take a 90 degree look to see that there was a plaza there. Of course, that's when you're in the 50 mile an hour traffic lane.

Q. Further down on the Berlin Turnpike, are there other pay phones, to your knowledge?

A. Yes, there are.

Q. How far down?

A. Just past Grossman's, which is next door to us, there is a Mobil Station. There is a phone there. On the other side of the street, where the Bradlee's store is, there is a pay phone. And a little bit further down from that, maybe a fifth of a mile or something like that, there is a State of Connecticut commuter parking lot that has a group of drive up type of pay phones.

Q. Mr. Samuelson, is the public invited to the Lechmere Plaza?

A. For the purpose of shopping. Yes.

Q. For any other purpose?

A. No.

MR. MEIKLEJOHN: I object.

[175] JUDGE BIBLOWITZ: It's already been answered. I'm not sure of the relevance. But it's been answered already. BY MR. JOY:

Q. At the relevant time period, that is June, July and August time frame of 1987, what were the store's hours?

A. The store's hours were opening at 10:00 A.M. until 9:30 P.M. Monday through Saturday.

Q. Were those also the same hours for the plaza?

A. Yes.

Q. And does Lechmere have any responsibility with respect to the parking lot at the close of business?

A. We control the parking lot lights, and thereby we have the lights automatically go off one half hour after closing, which enables enough time to allow the associates to get to their cars under full lighting.

Q. Drawing your attention to the parking lot, sir, where are customers allowed to park in that parking lot?

A. The customers are allowed to park in the entire area. No exceptions, other than the post[ed] handicapped positions which would be for handicapped only.

Q. Do customers park in the area that has been marked on Joint Exhibit 2 as an employee parking area?

A. Yes, they do.

Q. Is there any sign that indicates that that area is exclusively for the use of employees?

[176] A. No, there is not.

\* \* \*

Q. Do customers sometimes park in that area?

A. Yes, they do.

Q. Do you know whether or not — strike that.

Where, if you know, where [were] the areas in the parking lot where the union handbilled?

A. It was through the employee parking that was designated on the other map, and also in front of the store by the main entrance, what we had marked on the map as front entrance.

JUDGE BIBLOWITZ: It's right across from where it's marked front entrance, that rectangle?

THE WITNESS: From there all the way to the grassy area.

JUDGE BIBLOWITZ: So from that point down, from the rectangle, right across from where it says front entrance?

THE WITNESS: Right. This whole area in through there.

JUDGE BIBLOWITZ: So all those parking areas.

[177] MR. JOY: Your Honor, would it help if we marked with some letters in that area, or is it sufficient as it stands?

JUDGE BIBLOWITZ: Take a pen. Do you want to use the original?

MR. JOY: Yes.

JUDGE BIBLOWITZ: We've used letter A. Why don't you, for the purpose of simplicity, mark this rectangle A, this rectangle B. I'm sorry, mark this rectangle B, this rectangle C and this one D. How's that?

THE WITNESS: What about this?

JUDGE BIBLOWITZ: B, C, D, E. Mark right above between that F. Okay. Now just again to repeat what your testimony is, the union leafleted from D down to B?

THE WITNESS: They leafleted in B, C, D, and E.

JUDGE BIBLOWITZ: E? Okay.

BY MR. JOY:

Q. Is there any egress from the Lechmere Plaza on the south side?

A. Explain that question, please.

Q. Yes. Is there any way to cut through the Lechmere Plaza coming in from the Berlin Turnpike, and exiting out the west side?

JUDGE BIBLOWITZ: At the top of the exhibit?

MR. JOY: West would be at the top of the exhibit.

JUDGE BIBLOWITZ: Can we, for reference, put north, [178] south, east, west? Why don't you draw that? And this is south? Correct?

THE WITNESS: That would be south.

JUDGE BIBLOWITZ: So the question is is there any egress from the west side of that parking area?

THE WITNESS: No, there is no exit on the west side of the entire plaza.

BY MR. JOY:

Q. Is there any exit on the south side?

A. No, there is no exit on the south side.

JUDGE BIBLOWITZ: Not for cars at least?

THE WITNESS: No, nothing.

BY MR. JOY:

Q. Isn't there a fence funning up from west to east behind the Lechmere store?

A. Yes.

Q. Also with respect to Joint Exhibit 2, Mr. Samuelson, would you describe what, if any, barrier lies in front of the plaza stores?

A. There is a strip — I'm not sure what you'd want to call it — it appears on the map as being a very small long horseshoe. That is a curbed barrier that has grass and trees and shrubs and so forth planted in them.

JUDGE BIBLOWITZ: Right between E and F?

THE WITNESS: Right between E and F. Yes.

[179] BY MR. JOY:

Q. Mr. Samuelson, did the United Food and Commercial Workers Union ever make a request to you for the list of names and addresses of the employees at the Newington store?

A. No, they did not.

Q. To your knowledge, did they ever make any such request to any management representative of Lechmere?

A. No, they did not.

Q. Are you familiar with the geographical concentration of — strike that.

Are you familiar with where your employees reside geographically?

A. Yes.

Q. And how are you familiar with that?

A. Through our personnel records.

Q. Now can you tell me where the largest percentage of your employees reside?

A. It's made up of three basic towns: The town of Newington, New Britain and Hartford.

Q. Can you tell us how many of your employees reside in those three towns?

A. 179 out of 201, which is about 90 percent.

JUDGE BIBLOWITZ: Is this since the time you opened, or just in June or July?

[180] THE WITNESS: In the June and July period. Those figures are relatively accurate today also.

\* \* \*

[182] BY MR. JOY:

Q. Now, Mr. Samuelson, do you know if in Connecticut names and addresses can be obtained from the Division of Motor Vehicles by using the license plate number?

A. Yes, that's correct.

Q. Tell me how you know that?

MR. MEIKLEJOHN: I'm going to object, Your Honor. I mean this is not a matter in dispute. It's cumulative.

JUDGE BIBLOWITZ: It's true. It's been admitted, and it's been admitted that the union obtained the names and addresses that way. So you're going to get something that may be irrelevant.

MR. JOY: I want to supplement the testimony that was [183] given already in this case, Your Honor.

JUDGE BIBLOWITZ: Well, it's been admitted that the union used this procedure, and I know now that in Connecticut you can obtain names and addresses from the Motor Vehicle Bureau.

MR. JOY: And I believe this gentleman's testimony will show just how easy that is to do, in a matter of minutes.

JUDGE BIBLOWITZ: It doesn't really matter. The union admitted they did it. Whether it took them ten hours or five minutes I don't think is relevant. So let's move on.

MR. JOY: Your Honor, just as an offer of proof. If allowed to testify Mr. Samuelson will testify that he went to the Division of Motor Vehicles in Wethersfield, Connecticut, which is the town next door to Newington, that he submitted a list of license plate numbers and he received within a matter of ten to twelve minutes the names and addresses of those people, and returned to his place of employment shortly thereafter.



BY MR. JOY:

Q. Okay, Mr. Samuelson, did the store receive any complaints from employees about the newspaper advertisements?

A. Yes.

Q. Can you tell me roughly how many?

[184] A. A couple of dozen.

Q. Did the store receive any complaints from employees about receiving literature at home?

A. Yes.

MR. MEIKLEJOHN: I would object, Your Honor, to the form of the question. The store receiving complaints.

JUDGE BIBLOWITZ: Overruled.

BY MR. JOY:

Q. Did Lechmere receive any complaints from employees about receiving union literature at home through the mail?

A. Yes.

Q. How many?

A. A couple of dozen.

Q. To your knowledge, did the store, did Lechmere receive any complaints from employees about home visits and telephone calls from the union?

A. Yes, it did.

Q. And, again, can you tell me roughly how many?

A. About a dozen from home visits.

Q. Can you tell me what the nature of the complaints generally were?

MR. MEIKLEJOHN: I'm going to object. First on the grounds of relevance, and second, on the grounds that there is no foundation that [he] knows the substance of these complaints.

[185] JUDGE BIBLOWITZ: My problem is relevance. You know, I assume you wouldn't argue that the union has no right to contact people at home?

MR. JOY: No.

JUDGE BIBLOWITZ: What difference does it make if these people complained, you know, or were thrilled to have

the visits. I don't see what the relevance is. What's the relevance? I can more understand testimony regarding if employees complained about the handbills at the store, or anything like that.

Visits at home, the union has a right, I assume, to do that. What difference does it make if the employees were happy or unhappy about it?

MR. JOY: I'm not contesting the right of the union to do that, Your Honor. The relevancy is that it establishes that the message was received by the employees, in terms of the issue of a reasonable alternative means of communication.

There was a suggestion, I thought an inference, that Ms. Meucci was trying to make in her testimony, that the stuff was sent out, but there was no indication that it ever was received. And this evidence tends to indicate that the information was received, and it's just that there was no interest.

JUDGE BIBLOWITZ: Let's leave it at the mailings. [186] That's the issue that Ms. Meucci brought up, about the mailings. If you want to ask about the mailings go ahead.

MR. JOY: She also indicated that telephone calls were intercepted by parents in some instances.

JUDGE BIBLOWITZ: I'll sustain the objection to that.

BY MR. JOY:

Q. Now, Mr. Samuelson, I will ask you to focus your attention on the events of June 18, 1987.

MR. JOY: Your Honor, at this time I intend to inquire with Mr. Samuelson into the events which occurred on June 18, 1987, which will call for testimony that union representatives were inside the store, where they were inside the store, what they were doing and so forth.

In light of the colloquy yesterday I want to advise Your Honor and both counsel that that is my intention, and I assume that the same objection as yesterday will be lodged.

I would like to supplement my offer of proof somewhat, but if I may proceed, I will await counsel's objection following my question.

MR. MEIKLEJOHN: If you want, I am prepared to stipulate that you will ask him about the events that occurred in the store, and we'll stipulate that on the record, and the record will reflect that I raised an objection.

[187] If you feel you must ask the questions, I suppose you have the right.

JUDGE BIBLOWITZ: Just ask the question, then he'll object, then I'll make a ruling.

BY MR. JOY:

Q. Mr. Samuelson, do you recall events that took place on June 18, 1987, at the Lechmere Newington store?

A. Yes.

Q. Can you tell me what you first recall about events happening on that day?

A. The first event happened about 10:00 A.M. in the morning, where union representatives came onto Lechmere property, had entered the store.

MEIKLEJOHN: Object.

JUDGE BIBLOWITZ: Sustained. Let's leave it headed to the store. That you agree happened. You can use that as background. But after that I don't see the relevance.

MR. JOY: Your Honor, if allowed to testify Mr. Samuelson would testify that at around 10:00 A.M. on 6/18/87 five union representatives entered the store to handbill, and did so. One even went into the warehouse area, which was clearly marked "associates only". I have a photograph showing the entrance to the warehouse, which I would offer as an exhibit through the testimony of [188] Mr. Samuelson.

These five representatives were advised of the no solicitation policy, and were asked to leave Lechmere property. They returned, some of them, at 2:00 P.M. that day, Mr. Samuelson would testify. They came back inside the store, and they were asked to leave again some four or five times.

A Mr. James Phaiah was one of them. He ignored the request to leave, and indicated by facial expression that he was disregarding it. He had a smile on his face, Mr. Samuelson will

so testify, and eventually were — and eventually did leave the store.

So if allowed to testify that would be Mr. Samuelson's testimony.

JUDGE BIBLOWITZ: Okay, let's go on.

BY MR. JOY:

Q. Were there events which took place on June 20, 1987, at the Lechmere Newington store?

A. Yes, there were.

Q. Can you tell me what, to the best of your recollection, you recall about June 20, 1987?

A. At about 9:22 in the morning a late model Oldsmobile with Florida license plates had pulled into the parking lot area. Two union representatives got out of the car and began putting leaflets on windshields.

[189] Q. What happened after that, to your knowledge?

A. I went out there, quoted our no solicitation policy to them, and they immediately left, and were seen driving into the Grossman's parking lot and parked their car next door.

Q. At 9:22 were they clearly in the Lechmere parking lot?

A. No question about it. Yes.

Q. And they were putting handbills on the windshields of automobiles?

A. That's correct. And the cars were in the parking area.

Q. Could you identify the individuals who were engaging in that activity at 9:22 that morning?

A. Yes. They were both here yesterday: Mark Espinosa, if it's the correct pronunciation, and Joe Gagnon.

Q. They were asked to leave, were they not?

A. Yes, that's correct.

Q. And they did leave?

A. And they did.

Q. And they went over to the Grossman's parking lot?

A. That's correct.

Q. And did they return?

A. Minutes later. Yes.

Q. Roughly how many minutes later?

[190] A. 9:22 to 9:47, approximately 20 minutes.

Q. Did they return in car or on foot?

A. They returned on foot from the Grossman's area.

Q. And what happened when they returned on foot?

A. Steve Mittler was the first person to meet them in the parking lot. I was then called in as Steve was talking to the individuals out in the dog leg of the grassy area. I had just come out the parcel pick up door, with full intention to go up to them, and again state our no solicitation policy.

Q. When you first sighted them where were they?

A. They were in the dog leg, which is marked grass. If you'd like I can put a letter on it.

JUDGE BIBLOWITZ: Right just about the A, that middle area?

THE WITNESS: It is west of the A by about a hundred feet.

BY MR. JOY:

Q. Is that area Lechmere property?

A. Yes, it is.

Q. And what happened after that?

A. At that point I had seen that they were ignoring my request to leave Lechmere property. We had, of course, called the police at that point. I had, in talking about the no solicitation policy to them again, they began to ask [191] me: "Well, where is your property line? Where is the line?" One of them even stepped out onto the Berlin Turnpike, and said: "You also own the Berlin Turnpike?" I said: "Of course not." At no time did I actually say: "Here is our line" or "there it is".

At that time Police Officers Gallagher and I forget the other officer's name, it starts with a C, pulled up. They had parked alongside the same grassy area that I had identified as being on Lechmere property.

Q. Let me stop you here. On which side of that grass area?

A. There were two squad cars. One was like towards the bottom, one was on the inside.

JUDGE BIBLOWITZ: And that's where it says employee side of the grass area?

THE WITNESS: Yes.

BY MR. JOY:

Q. So one squad car was parked on the west side of what you referred to as the dog leg?

A. Yes.

Q. And the other squad car was parked inside the parking lot to the north of what you've described as the dog leg?

A. That's correct.

Q. Would you continue, please? What happened after that?

[192] A. The police officers had first come to me and asked, you know, "what is the problem? Why did you call?" I said basically: "These people are trespassing on Lechmere property, and I would like them to leave our property."

Q. And what did the officer say to you?

A. The officer said he would go and talk to them. That obviously there was a public area up near the highway, and if I would wait back here he would go and discuss the issue with them.

Q. And did you wait back?

A. Yes, I did.

Q. And did you observe him going up and speaking with the union representatives?

A. Yes, I did.

Q. And at some point in time did he return to speak to you?

A. Yes, that's correct.

Q. What, if anything, did he say at that time?

A. He had told me that he advised them that they had the freedom to be in the public area, but he did tell them to stay off of Lechmere property.

Q. And what did you do, if anything, at that point?

A. I was happy with that solution, because that was my intention, to keep them off of Lechmere property, and had full knowledge that they had the right to be on the public [193] way.



Q. Did you leave at that point?

A. At that point I left, the police officers left, the union representatives stayed for five or ten minutes, and then they ultimately left.

Q. When you spoke with the police officer at any time did you raise your voice?

A. No.

Q. Mr. Samuelson, during the course of the latter part of June and July, was literature found inside the store?

A. Many times. Yes.

Q. And was it also found inside merchandise?

MR. MEIKLEJOHN: Objection.

JUDGE BIBLOWITZ: Sustained.

MR. JOY: Your Honor, if allowed to testify, he would testify that union literature was stuffed inside merchandise boxes.

JUDGE BIBLOWITZ: Let's make clear, one reason why I am sustaining these objections. I assume that the employer's position here is that even if the union had not been, in the first thing in the morning, had gone into the store and solicited in the store and stuffed handbills in merchandise or gone into the warehouse, the employer would still have restricted the union as it did.

I mean, the fact that they were in the store did not [194] make — was not the deciding factor in the employer's decision to bar the union for engaging in certain activity.

MR. JOY: The relevance of this, Your Honor, as I pointed out, was twofold. It will bear on the reasoning behind the mounting of the roof camera, as well as the issue of the factor articulated in Fairmont Hotels, that sometimes the manner in which the right is exercised bears on whether the Section 7 right counterweights [outweighs] the property right.

BY MR. JOY:

Q. We have a stipulation in the record that says picketing began by the union on August 7, 1987. Do you happen to know what the picket signs said?

MR. MEIKLEJOHN: I would object, Your Honor.

JUDGE BIBLOWITZ: Sustained.

MR. JOY: If allowed to testify, Mr. Samuelson that the picket signs said: "Don't shop at Lechmere, non-union store. This is to advise the public that Lechmere does not have a contract with the United Food and Commercial Workers Union Local 919, etc".

JUDGE BIBLOWITZ: Okay, let's move on.

MR. JOY: Your Honor, at this time I'd like to request an additional stipulation, that the union in this case does not represent, and has not represented, any of the employees at Lechmere as collective bargaining representative.

[195] JUDGE BIBLOWITZ: You don't have any trouble with that?

MR. MEIKLEJOHN: No. We'd stipulate to that.

MS. COLLINS: No problem, Your Honor.

JUDGE BIBLOWITZ: Okay, stipulation received.

\* \* \*

#### [199] *Cross Examination*

BY MR. MEIKLEJOHN:

Q. You testified that on June 20th of 1987 the union representatives arrived in the parking lot at 9:22 A.M?

[200] A. That's correct.

\* \* \*

[205] Q. Mr. Samuelson, you testified about a sort of jagged diagonal line across the property, that divides your property from Conover's [Konover's] property?

A. Yes, that's correct.

Q. If I went onto the premises and I'm standing there, would I see any line or any indication of where that demarcation is?

A. No.

Q. So a customer, or anyone else who comes onto the property, had no idea whether he's on Conover [Konover] property or Lechmere property?

A. That's correct.

Q. Now you testified about various incidents of solicitation that occurred?

[206] JUDGE BIBLOWITZ: Or attempted.

Q. Or attempted solicitation that occurred dating back to November of —

JUDGE BIBLOWITZ: 1986.

MR. MEIKLEJOHN: Thank you, Your Honor.

A. Yes.

Q. Where on the property did that — the Salvation Army, was that the first one?

A. No, the first one was the AAA.

Q. Did they distribute throughout the entire parking lot?

A. Yes, they did.

Q. Which of the satellite stores were open at that time?

A. In November of 1986, when we opened, none.

Q. Burger King also supposedly put those leaflets on the cars. Did you — were any of the satellite stores open at that time?

A. In February? No.

Q. When did the satellite stores start to open?

A. In the spring of 1987, March/April period.

Q. There were four that were open in June of 1987?

A. That is correct.

Q. How about in April of 1987, were those four open at that point?

A. In April of 1987, I'm not sure. I'd have to check that.

[207] Q. Were some of the stores open at that time?

A. In April? They could have been.

Q. When this solicitation occurred on June 18th, do you know who initiated the contact with Conover [Konover]? Was that you or somebody else from your company?

A. The contact at Conover [Konover] was probably made by someone else.

Q. It was not initiated by you?

A. No.

Q. No one from Conover [Konover] called you?

A. No, that's correct.

Q. How long have you worked for Lechmere? Not just at this store.

A. Six years.

Q. And you worked at other stores in the past, I take it?

A. Yes, that's correct.

Q. Was the rule, the no solicitation rule in effect at the time you started working for Lechmere?

MR. JOY: Objection.

A. Yes.

JUDGE BIBLOWITZ: Overruled. The same one, or any no solicitation rule?

MR. MEIKLEJOHN: Well, I guess we do have a stipulation to exactly what.

[208] BY MR. MEIKLEJOHN:

Q. In substance it was in effect when you started working there? There had been a change in the word employee to associate.

A. That was in 1986. Yes. In 1982, as a matter of fact I had started in March of 1982. The no solicitation policy was in effect, and was later revised in 1986, as stipulated.

Q. Now were you involved in formulating that policy?

A. No, I was not.

Q. Did you have any input into it? Were you consulted with respect to its contents?

A. No, but when I had joined the company the policy was already in place.

Q. Who enforced it — I'm sorry.

A. The consultation of just changing the term associates to employees. No, I was not asked my opinion on that.

Q. When you first started working for Lechmere did someone inform you of that rule?

A. It was part of my responsibility to read the company policies and procedures, to become familiar with them, so that I could exercise my duties.

Q. Is that the same employee handbook that you —

A. That's a piece of it. Yes.

Q. There's other documents you referred to?

A. How to open the store with the computers. Yes, many [209] things.

Q. You had to read a lot of stuff in order to work for this company?

A. That's correct.

Q. Did one of those documents tell you what the purpose of the no solicitation rules were?

A. Yes. As I recall, yes, the no solicitation policy itself indicates that.

Q. Indicates the purposes? Let me ask you, before we get to that, were there any other documents that told you what the purpose of the rule was?

A. No, not that I can recall.

Q. Now let me show you a copy of Respondent's Exhibit 4, and ask you what there is in that that tells you what the purpose of the rule is?

JUDGE BIBLOWITZ: Take your time and read it over, and see if there's, to your mind, that it describes the purpose of the rule.

A. Okay. No, I don't believe this indicates the purpose of the rule.

Q. Can you think where it was that you learned what the purpose of the rule was?

A. It was in a previous assignment in a different store that I had learned that.

Q. Did somebody tell you what it was, or was it something [210] you read?

A. Well, during my first thirty days I was given an orientation in another store, with another store manager, where we covered policies, procedures and so forth. And in all probability, that was covered with me in March of 1982.

Q. Can you remember him telling you that one of the purposes of the rule was to keep out illegal trespassers?

A. You're asking for recognition going back many, many years. It's difficult. During that orientation I was exposed to many such policies, and probably very easily could have been exposed to the purpose of the no solicitation policy. I could not give you exact dates or whom by.

Q. Well, you have it in your mind at this time what the purpose of the policy is? Correct?

A. Yes.

Q. Is that as a result of something somebody told you more recently since you took over the Lechmere store?

A. No, definitely not. That was fairly clear in my mind going back to 1982.

Q. Now one of the purposes was to keep out illegal trespassers?

A. That's correct.

Q. You don't remember who told you that that was one of the purposes?

[211] A. No, I don't recall who told me that.

Q. To you, who would be an illegal trespasser? Is that somebody who is committing a violation of the law, by stealing —

MR. JOY: Objection, Your Honor. Hypothetical question.

JUDGE BIBLOWITZ: Overruled.

Who would be illegal trespassers? Is that the term?

MR. MEIKLEJOHN: Yes.

JUDGE BIBLOWITZ: Who would be, in your mind?

THE WITNESS: In my mind, it would be anyone that would be coming to the store not for the purpose of shopping, but for the purpose of distributing literature, raising funds for a church, a bake sale, many of those factors.

BY MR. MEIKLEJOHN:

Q. So the first purpose basically of the no solicitation rule is to keep solicitors out? Correct?



A. That's correct.

Q. Now the second reason you listed was to prevent the harassment of customers?

A. That's correct.

Q. Do you recall who told you that that was one of the purposes of the rule?

A. Again, specifically no, but I had a very clear understanding of that, because I myself as a shopper object [212] to walking in a store and have people shaking cans in your face. I don't like that.

Q. So, in your mind, harassment would be somebody thrusting things at you, handing you things?

A. Asking to buy raffle tickets, or cookies, or candies, or buy T shirts for the cub scouts, whatever that may be. Yes.

Q. It's in the nature of —

A. Nuisance.

Q. . . . verbal nuisances? That type of thing?

A. Verbal nuisances. Yes.

Q. Now the third purpose is to prevent confrontation? Is that correct?

A. That's correct.

Q. Now when you speak of a confrontation, that again would be a face to face situation, where somebody is asking a customer to give them something, to buy something, or to take something the customer doesn't want?

A. That's correct.

Q. And that can result in an argument?

A. An argument, an act of violence. Yes. Even damage to someone's car.

Q. Now can you recall — can you think, at this time, of any other purpose for which this rule is listed?

MR. JOY: Objection, Your Honor. He's testified to [213] other purposes on this direct.

JUDGE BIBLOWITZ: Then he can tell us. Overruled.  
BY MR. MEIKLEJOHN:

Q. Any other purposes for which the rule exists, other than the ones you've just told us about?

A. No, generally that's it.

Q. Let me ask you one more question. When you were first told about the no solicitation rule, were you told that one of the reasons for the rule was to keep union solicitors off the premises?

A. No.

Q. It's true, is it not, that it is the position of Lechmere that it prefers that its employees not be represented by a union? Is that correct?

MR. JOY: Objection.

JUDGE BIBLOWITZ: Overruled.

A. We're not against unions. We're pro-associates.

JUDGE BIBLOWITZ: Is it true or is it not? Repeat the question, if you wish.

BY MR. MEIKLEJOHN:

Q. Is it true that Lechmere prefers that its employees not be represented by a labor organization?

MR. JOY: Objection. Asked and answered.

JUDGE BIBLOWITZ: Overruled. No, it hasn't. Is that true, that Lechmere prefers that its employees or [214] associates not be represented by a labor organization?

THE WITNESS: Probably.

JUDGE BIBLOWITZ: Probably true. Okay.

BY MR. MEIKLEJOHN:

Q. Did you on July 1st, do you recall on July 1st, sending a letter? July 1st of 1987? Sending a letter to Lechmere Associates, in which you stated: "We place great value on having the ability to communicate and deal directly with you, something that typically does not occur if there is a third party, such as a union, involved"?

MR. JOY: Objection.

JUDGE BIBLOWITZ: Overruled. Did you write a letter to that effect?

THE WITNESS: I recall a letter. Yes.

BY MR. MEIKLEJOHN:

Q. Do you recall a letter that stated that in substance?

A. In substance. Yes.

MR. JOY: Your Honor, I object. I think he's entitled to see the entire letter.

JUDGE BIBLOWITZ: I agree. This isn't a memory test. If you want to show it to him. You don't have to have it marked. Just show it to him.

Off the record.

(Off the record to examine document)

JUDGE BIBLOWITZ: Do you want to show the witness what [215] you're referring to?

BY MR. MEIKLEJOHN:

Q. I'll just show you this document, and ask if that refreshes your recollection that you sent a letter to employees stating what I previously suggested?

A. Yes, I did.

Q. My only other question to you is does that, in fact, reflect Lechmere policy?

A. Yes.

Q. Now you had an opportunity to read the literature which the union was placing on employee cars?

A. Yes, that's correct.

Q. Is it fair to state that it was your understanding of the literature that it was designed to convince the employees that they would be better off being represented by a labor organization?

MR. JOY: Your Honor, I'm going to object. I don't understand what the relevance of this examination is. We have three specific allegations contained in this complaint. One relates to the incident on June 20th, one relates to the mounting of a video camera, and one relates to the general proposition of access to the parking lot. I don't see what this line of inquiry serves to advance the relevant cause of either one of those three issues.

JUDGE BIBLOWITZ: Mr. Meiklejohn?

[216] MR. MEIKLEJOHN: Very briefly, the purpose goes to the purpose — I believe the question goes to the purposes —

I believe the question I went through, the purpose of the no solicitation rule, the purpose for which it was enforced in this particular case.

MR. JOY: Your Honor, the testimony has been that it has been uniformly enforced, against the Girl Scouts, Salvation Army, etc.

JUDGE BIBLOWITZ: But. Mr. Meiklejohn is entitled to cross examine your witnesses to establish whether it actually has been, just as you are entitled to cross examine his witnesses. I'll allow a little bit of leeway in this. Overruled. Don't get too deeply into this.

MR. MEIKLEJOHN: I won't.

BY MR. MEIKLEJOHN:

Q. Do you remember what the last question was?

A. No, I, frankly, don't.

Q. Did you recognize that the purpose of the leaflets were to convince employees that they would be better off being represented by a union?

MR. JOY: Objection, Your Honor. Beyond the scope of direct examination.

JUDGE BIBLOWITZ: Overruled. Did you recognize that as the purpose of the leaflet?

THE WITNESS: Which leaflet? I mean there were many. [217] There seemed to be many different directions that I recall on some of the leaflets. I recall one dealing with benefit issues. I recall, and perhaps I might be a little cloudy on some of the advertisements; which leaflets are you referring to?

JUDGE BIBLOWITZ: Do you want to ask in general, the nature of the leaflets in general, or specific ones?

BY MR. MEIKLEJOHN:

Q. I'll show you —

MR. JOY: At the risk of interrupting one more time, and it will be my last time. I would like to raise a continuing objection to this line of inquiry, inasmuch as counsel for the general counsel had called this witness as a 6(11)(c) witness in this case earlier.

I have not gone into this subject on my direct examination. The federal rules of evidence limit the scope of cross to that which was examined on direct. So I'm not going to interrupt as we go along, but I would appreciate an agreement that I have a continuing objection to this line of inquiry.

JUDGE BIBLOWITZ: I understand that. My problem is more relevance. I think we're just getting into an area that is really not going to serve much purpose.

That's in evidence. I can look at it, and certainly make a determination as to the purpose of the document. But [218] if you want to ask briefly, go right ahead.

MR. MEIKLEJOHN: This has all been on one question so far.

JUDGE BIBLOWITZ: Show it to him.

BY MR. MEIKLEJOHN:

Q. I'll show you General Counsel's 3, for example, and ask you by reading that, if you recognize that the purpose of that was to convince employees to join the union?

A. This seems to be convincing [convincing] the employee that there are no threats allowed, you've got a right to organize, don't be vague about threats, write down what was said.

So, as I earlier said, there was another brochure that had dealt with benefits. So, to answer your question, in terms of this leaflet, I don't think this is saying to the associates "This is why you should join the union."

MR. JOY: There's another side to that.

JUDGE BIBLOWITZ: See on the other side.

THE WITNESS: The other side, I guess basically, would be an invitation to join the union.

BY MR. MEIKLEJOHN:

Q. And the first side, would it be fair to say essentially don't be afraid to join the union?

MR. JOY: Objection, Your Honor. The document speaks for itself.

MR. MEIKLEJOHN: I'll withdraw the question.

[219] JUDGE BIBLOWITZ: Let's move on.

MR. MEIKLEJOHN: I'll try just one more time to ask the question.

BY MR. MEIKLEJOHN:

Q. Did you recognize that the overall thrust of the leaflets that were being given to the employees or the associates, was to convince them that they should join the union?

MR. JOY: Objection.

JUDGE BIBLOWITZ: Overruled. Was that the overall thrust of all the leaflets that you saw?

THE WITNESS: It seemed to be. Yes.

BY MR. MEIKLEJOHN:

Q. And you would prefer, you testified, that the employees not select a union to represent them? Correct?

A. Yes.

Q. Is it fair to say that by keeping those leaflets out of employees' hands they would — keeping the union's leaflets out of the employees' hands, they would be less likely to decide to join a union?

MR. JOY: Objection.

JUDGE BIBLOWITZ: Sustained.

BY MR. MEIKLEJOHN:

Q. I'll ask the next question. Was that one of the [220] reasons why you tried to keep the leaflets out of the employees' hands, so that they would be less likely to decide to be represented by the union?

MR. JOY: Again, I object. This was not something —

JUDGE BIBLOWITZ: Overruled. Was that one of the reasons?

THE WITNESS: It's very difficult to answer. I think my primary reason was to continue the consistent enforcement of the no solicitation policy.

And while that particular instance that you're talking about, yes, that would keep literature from some of the associates.

BY MR. MEIKLEJOHN:

Q. And that was not the primary purpose, but was one of the purposes? Is that what you're saying?



A. The primary purpose was the no solicitation policy enforcement.

Q. This was a secondary purpose then?

A. Harrassment of our associates.

Q. Does Lechmere receive copies of the Hartford Courant at the premises of the store?

A. Yes, we do.

Q. Did you yourself remove campaign advertisements from the copies of the newspapers which you received at the store?

A. Yes, I did, along with competitive ads, as is the [221] practice for having the subscriptions.

Q. You testified about complaints which you received from customers about the leaflets in the parking lot?

A. Yes.

Q. Did you personally receive any of those complaints?

A. I personally received a couple. Yes.

Q. Do you recall when you received those one or two complaints?

A. Date and timewise, no, I don't. But it was, of course, obviously during the activity when leaflets were on the cars, because I did have some customers come in and ask to see the store manager, and complain that they didn't like shopping when they were being harrassed with things on their windshields.

Q. Now this happened — was that on the first day when the union placed leaflets in the parking lot? Do you know?

A. No, I don't think I had any on the 18th, but after that I did.

Q. You testified that employees complained about leaflets on the cars?

A. Yes.

Q. Did those employees complain to you personally?

A. Yes, they did.

Q. Do you recall approximately how many employees complained?

[222] A. A couple of dozen.

Q. And you say they also complained about the newspaper ads?

A. Yes, they didn't like the idea of the ads themselves.

Q. How many employees complained to you personally about the newspaper ad?

A. Six or eight perhaps.

Q. Are there any signs or indications on the pay telephones that those phones are solely for the use of customers of Lechmere, and other stores in the Lechmere Plaza?

A. Very frankly, I have no idea what is on the pay phone other than dialing instructions.

Q. Have you ever looked at the phone?

A. No.

Q. Do you know who the phones belong to?

A. A.T.&T. That's a guess. The phone company.

Q. They belong to the phone company?

A. Yes.

Q. Not so simple to figure out, who the phone company is any more. But do they belong to one of the phone companies?

A. One of the phone companies.

Q. Do you know who arranged to have the phones placed in the plaza?

[223] A. Well, it would be a customer convenience. As you get people that are shopping, that may go out in the corridors.

Q. I'm afraid you're not really answering any question.

A. I'm sorry.

Q. Do you know who —

MR. JOY: There is no motion to strike as being non-responsive. He interrupted the witness's answer.

JUDGE BIBLOWITZ: Same thing. I'm not going to hold him to use magic words. Do you know who arranged for the telephones to be installed?

THE WITNESS: Probably Conover [Konover] Management, if you're talking about those two phones there. Yes, I would guess. I'm not sure.

BY MR. MEIKLEJOHN:

Q. It wasn't Lechmere then?

A. I don't know if we did or didn't. Like I said, I am guessing that maybe Conover [Konover] may have arranged that. I don't know.

Q. Does Lechmere also have some pay phones inside the lobby of the store, or in the entryway to the store?

A. Yes, we do.

Q. So those are not visible and not accessible to someone who is not a customer to Lechmere, unless he happens to know that the phones are there for some reason? Correct?

[224] A. Would you repeat that?

Q. The ones on the inside of Lechmere's, wouldn't be accessible to someone who is not a customer of Lechmere, unless they happened to be aware that those particular phones were there?

A. That's true. Yes.

Q. On the other hand, the ones in front of the plaza are not surrounded or enclosed in any fashion? Is that correct?

A. That's true. They would have access 24 hours a day, the ones inside Lechmere would be limited to store hours if someone knew they were there. Yes.

Q. You testified that the United Food and Commercial Workers never requested employee names. Does Lechmere have a policy on giving out employee names?

A. Not that I'm aware of.

Q. Do you know what you would do if United Food and Commercial Workers had asked for those names?

MR. JOY: Objection.

JUDGE BIBLOWITZ: Sustained.

BY MR. MEIKLEJOHN:

Q. You testified that I guess it's 179 out of 200 employees came from Newington, New Britain and Hartford. Do you know the approximate population of Newington?

A. I really don't. I'm sorry.

Q. Hartford is approximately 150,000? Do you know if [225] that's the right ballpark?

A. It may be. I know there's 880,000 in the region.

Q. The region being the Hartford metropolitan area?

A. Yes. Where we would be a customer base to draw on. What the specifics are of New Britain and Newington are, I'm not sure.

\* \* \*

[229] Q. There were no incidents of pickets engaging in acts of violence? Correct?

A. That's correct.

Q. There were no incidents of pickets hurling insults or harassing customers? Correct?

A. No, that's correct, and that's why we stopped even watching them on the camera.

Q. Did you continue to keep the camera focused on them even though it wasn't recording them?

A. Focused? No. Most of the time the camera was on automatic, which means it just did a gradual sweep of the areas, as would all the cameras inside the store.

\* \* \*

[230] Q. First, you testified that agents of the union placed handbills on cars, and then left the property when instructed to do so?

A. Around the 20th?

Q. Around the 20th.

A. That's correct.

[231] Q. And about twenty or twenty five minutes later they returned to the grass area? Correct?

A. They returned to the grass area from Grossman's. Yes.

Q. There were four of them at that point?

A. I believe so. Yes.

Q. With respect to this map, Joint Exhibit 2, this dotted line in the grass area, that represents approximately the border between public property and Lechmere property? Is that correct?

A. That's correct.

Q. So if pickets were on the grass area —

A. The June pickets.

Q. Pickets is the wrong word. I'll have to be careful. Handbillers were on the grass area on June 20th, they would have to be right next to your property, or within a few feet of your property, they were on the main grass strip — I mean, right next to your parking lot to be on your property? Correct?

MR. JOY: Objection. I'm not sure I understand the question.

JUDGE BIBLOWITZ: I didn't either.

BY MR. MEIKLEJOHN:

Q. If the handbillers were on the grass strip —

JUDGE BIBLOWITZ: Which grass strip?

MR. MEIKLEJOHN: The large grass strip which runs the [232] length of the property.

JUDGE BIBLOWITZ: All right.

BY MR. MEIKLEJOHN:

Q. They would be on public property unless they were within a few feet of your parking lot? Correct?

A. Yes, that's right.

Q. You prepared a written incident report describing the events of that date? Correct?

A. Correct.

Q. Did you prepare that on the date that it occurred?

A. Yes, I did.

Q. When you prepared that did you write — do you have a copy of it?

JUDGE BIBLOWITZ: Show the witness a copy of it, and let him read it.

A. 9:47.

Q. Yes, you wrote in describing the events at 9:47.

A. This is the second time. Yes.

Q. Did you write that you went outside and saw the four people in the grass area? Is that the way you described your observations when you first approached the people?

A. Yes.

Q. Did you make any notation on your incident report as to the fact that they were on the area which you've referred to as the driveway?

[233] MR. JOY: Your Honor, it's not clear whether we're talking about one or two incidents. And, if so, if we're talking about two, which incident we're talking about on the morning of the 20th.

JUDGE BIBLOWITZ: I think the witness said he understands that's after they returned. Is that correct? Do you understand that Mr. Meiklejohn questioned you about when they returned?

THE WITNESS: When they returned the second time that morning.

MR. JOY: Okay, I withdraw my objection.

BY MR. MEIKLEJOHN:

Q. The question is in that report did you specify, when you talked about the grass area, if you're talking about this, or the dog leg, which is perpendicular, which says grass?

A. When I walked out the pick up entrance to meet them —

Q. The question relates to the document.

A. I first saw them in the dog leg grass area here.

Q. But when you described it on your incident report?

A. I referred to the grass area. They are both grass areas.

Q. And you made no indication that they were on the — there is nothing on the report to indicate that they were in the dog leg area? Correct?

[234] A. No, that's true.

Q. And there is nothing in the report to indicate that they were, in fact, on Lechmere property? Correct?

A. That's true.

Q. Now you testified that one of the leafleters, when you approached them, asked where the property line was? Correct?

A. That is correct.

Q. Do you recall what your response to that was?

A. I did not give a specific response. I just said: "Stay off of Lechmere property."



Q. But you didn't tell him where Lechmere property ended and began?

A. I did not draw a line. No, I did not.

Q. Did you indicate which portion, if any, of the grassy strip belonged to Lechmere, and which portion belonged to the public?

A. No, I did not.

Q. Now when you approached the — when you came out to approach the leafleters, where were they standing when you got to the grass area? Where on the grass area?

A. They were moving from the dog leg grass area towards the big grass area.

Q. Well, when you got there where were they?

A. When I got there they were just about in the big grass [235] area.

Q. So when you got there you told them to get off of Lechmere property?

A. To get off of Lechmere property, because I had just seen them on it.

Q. But at that point they were off of Lechmere property? Correct?

A. Yes.

Q. And they asked you where they could go, and where they were allowed to be, and where they weren't allowed to be? Correct?

A. Right.

Q. And you didn't answer that?

A. I knew they could be in the public area.

Q. But you didn't tell them where the public area began? Correct?

A. No, I didn't feel it was my obligation to take a chalk line out there and mark it.

Q. They were on the public area at that point? Correct?

A. At that moment.

Q. And you told them to get off of your property?

A. As I had done six or seven times previously.

Q. And they were off of your property at that point? Correct?

MR. JOY: Objection. Asked and answered.

[236] JUDGE BIBLOWITZ: It's been asked and answered. BY MR. MEIKLEJOHN:

Q. So at the time you told them that you were going to call the police they were on public property? Correct?

MR. JOY: Objection. There's been no such testimony.

JUDGE BIBLOWITZ: Overruled. At the time you went to call the police.

BY MR. MEIKLEJOHN:

Q. At the time you told them you were going to call the police were they on public property?

A. The police had already been called, as I was coming out the door.

Q. So you had the police called before you approached them? Is that right?

A. Yes.

Q. Let me draw your attention once again to your incident report of June 20, 1987, seven lines from the bottom.

MR. JOY: Your Honor, pardon me for interrupting, but I provided counsel for the general counsel two incident reports.

JUDGE BIBLOWITZ: This is the one page one.

MR. JOY: One separated by 20 minutes. I'd like him to identify for the record which incident report of 6/20/87 he's referring to.

JUDGE BIBLOWITZ: This is the single page one?

[237] BY MR. MEIKLEJOHN:

Q. Let me show you a document, incident report dated June 20, 1987, 9:47 A.M., about seven lines from the bottom, and ask you to read the sentence which begins: "I then told them ..."?

A. Okay. "I then told them I would call the police if they did not leave our property."

Q. Now that was after you had come out and confronted them? Correct?

A. Yes, but the police were already called.

Q. This was after you had asked them to leave the property? Correct?

A. Correct.

Q. This is while they were on the grassy strip which you described as public property?

MR. JOY: Objection, asked and answered.

JUDGE BIBLOWITZ: Overruled. Was that while they were on the public strip, at the time you said that to them?

THE WITNESS: Yes.

BY MR. MEIKLEJOHN:

Q. Now I would ask you to read the sentence immediately after the one you just read?

A. It says: "They didn't leave so we called the police." And the next sentence is.

Q. That's fine.

[238] MR. MEIKLEJOHN: Nothing further, Your Honor.

JUDGE BIBLOWITZ: Any further cross examination from the charging party?

MS. COLLINS: No, Your Honor.

JUDGE BIBLOWITZ: Any redirect?

MR. JOY: Yes, Your Honor. If I just may have one moment?

JUDGE BIBLOWITZ: We'll take a few minutes.

(Off the record for a short break)

JUDGE BIBLOWITZ: Mr. Samuelson will now be questioned by Mr. Joy.

*Redirect Examination*

BY MR. JOY:

Q. Mr. Samuelson, you were asked several questions on cross examination by counsel for the general counsel, relating to a letter dated July 1, 1987, and signed by yourself. I have put a copy of that document in front of you, and ask if you see it?

A. Yes.

Q. Now I would like to ask you if you sent that letter?

A. Yes, I did.

Q. And did you send it to employees of the company?

A. That's correct.

Q. Does that letter say, in part: "We feel we have an obligation to maintain an environment free of interruption [239] and inconvenience for both our customers and our associates"?

A. That is correct.

Q. Does that letter also make reference to newspaper ads and telephone calls, and complaints by employees about telephone calls at home?

A. Yes, it does.

Q. And newspaper ads?

A. Yes.

Q. Now, in terms of the incident reports, did you fill out two incident reports for the events of the morning of June 20, 1987?

A. Yes, I did.

Q. You've been examined on one that is dated and timed 9:47 A.M? Correct?

A. That is correct.

Q. By the way did you know at the time exactly where the line of demarcation between Lechmere property and public property was, at the 9:47 incident?

A. I had a general idea.

Q. But you didn't know precisely?

A. Precisely, no.

\* \* \*

[244] JUDGE BIBLOWITZ: Mr. Samuelson, you're excused.

While we're still on the record left over from yesterday is the subpoena that Mr. Joy had requested from me. Mr. Joy, you want to turn it over to Ms. Meucci. And then I'll see if there is anything forthcoming from general counsel in that regard. That's a subpoena for the names, I guess, she had

gotten, notes regarding the names she had gotten of the employees from the Motor Vehicle Bureau.

MR. JOY: Let me read what I said here. The subpoena calls for any documents including, but not limited to, notebooks, logs, lists of Lechmere Newington employees relating to the union's efforts to communicate with Lechmere Newington employees.

JUDGE BIBLOWITZ: Now that Ms. Meucci has received it, Mr. Meiklejohn, do you have anything to say in regard to that?

MR. MEIKLEJOHN: Are we on the record, Your Honor?

JUDGE BIBLOWITZ: Yes.

[245] MR. MEIKLEJOHN: Well, I'd like to have an opportunity to review it first. I would also like to note, although we may end up on the record on this ultimately, I remind you that the rules do provide that a subpoena first be made off the record.

There will be, I believe, a petition to revoke, and the rules do provide that subpoena rulings ordinarily be made off the record. And placed on the record only if proved necessary.

JUDGE BIBLOWITZ: Let's see how it goes. You want some time to look over the subpoena? Let's go off the record for a moment.

(Off the record to examine document).

JUDGE BIBLOWITZ: Mr. Meiklejohn, you've had an opportunity to look over the subpoena?

MR. MEIKLEJOHN: Yes. Very briefly, I would object to the (sic) petition to revoke the subpoena on the grounds that it calls for the production of documents which contained extensive irrelevant information.

It reveals the responses made by — the documents which are covered by the subpoena would reveal responses of employees who were contacted by the union, whether they were favorable, unfavorable. It would reveal which employees expressed an interest in the union, and communications which I believe the employees had a right to expect would be [246] confidential.

And which, for that reason, it would be highly prejudicial to the employees potentially, placing them at risk to having that information turned over to respondent, whereas the relevant point is the point which has been brought out already, which is that the union was able to obtain the names of a certain number of employees, what those employees said when they were contact[ed] by respondent is totally irrelevant — by the union rather, is totally irrelevant to this proceeding.

JUDGE BIBLOWITZ: Mr. Joy, what is your response to that?

MR. JOY: Your Honor, I would assert that this information is relevant to this proceeding. The witness, Ms. Meucci, testified that she had problems recalling exactly the number, and the logbook that counsel for the general counsel has in front of him would provide the exact information.

All of this information is directly relevant to the question of the reasonable alternative means of communication, and I won't repeat the reasons that I advanced yesterday when we did stop on this point, and argued it at some point in the record yesterday.

But I incorporate by reference all of the points I made at that particular time. I believe I'm entitled to that [247] information. I believe it's relevant. I believe that insofar as the concern about the confidentiality is concerned, I believe the witness's testimony was that it was only one employee who indicated any response from the mailings. So I don't know what it is that is so ultra confidential in that regard.

I'm only trying to establish through independent documentary evidence that the numbers that this witness seemed to recall, that is Ms. Meucci in her testimony, are borne out by the records that she kept.

JUDGE BIBLOWITZ [MR. MEIKLEJOHN]: Your Honor, if the purpose for which the document is being requested, perhaps there should be some sort of description into the record as to what we're talking about. It is, in fact, a logbook with a separate page for each individual, and various



information regarding that individual that the union was able to obtain contained on that page.

If respondent — I think it's perfectly legitimate that respondent is interested in verifying the number of employees, and I would have no objection to the logbook being turned over to some mutually agreeable disinterested person, to count the number of pages with employee names on them, to verify. Whether that had to be the judge, or somebody in my office who is not involved in the case, can be trusted to count the pages, to verify the numbers. I [248] certainly have no objection to that.

The information reported on the pages, which I am contending is both irrelevant and potentially prejudicial.

JUDGE BIBLOWITZ: Mr. Joy?

MR. JOY: Your Honor, it may well be that there are certain portions of it that I would want to move into the record. Although I am willing to agree to some kind of in camera inspection, I don't want to be limited to that. I don't want to state that that's my limited purpose for seeking this information.

JUDGE BIBLOWITZ: Let me say that I agree with what Mr. Meiklejohn said, regarding the names and the comments. I think that although the numbers would be relevant, the names and the comments would certainly not be — the names would be tangential, and the comments would be possibly prejudicial to the employees.

So I'll sustain Mr. Meiklejohn's petition in that regard.

Now if you wish me, or someone else, to make an in camera inspection, and give you the number of different employees listed in that book, that's fine. I agree that that's relevant, but other than that I would sustain Mr. Meiklejohn's position.

MR. JOY: I will state for the record that I will not request that the Administrative Law Judge review the [249] document for that limited purpose.

JUDGE BIBLOWITZ: Okay.

MR. MEIKLEJOHN: Does that mean that you want someone else to do it?

MR. JOY: No.

JUDGE BIBLOWITZ: Let's move on. Another witness?

MR. JOY: I do not, Your Honor. Respondent rests.

\* \* \*

JUDGE BIBLOWITZ: Back on the record.

Mr. Meiklejohn, I assume that there will be rebuttal, since you said there will?

MR. MEIKLEJOHN: Yes.

\* \* \*

[250] JUDGE BIBLOWITZ: Ms. Meucci, you want to take the stand? You've been previously sworn. We don't have to do that even though it's a different day, it's the same person. There will be one question from Mr. Meiklejohn.

Mr. Meiklejohn?

#### *Direct Examination*

BY MR. MEIKLEJOHN:

Q. On June 20th, when you went to the Lechmere Plaza to handbill next to the entrance, did you go onto the grassy area which has been labeled the dog leg at all?

A. No, not the dog leg.

MR. MEIKLEJOHN: That's all.

JUDGE BIBLOWITZ: Anything?

MR. JOY: Yes, Your Honor.

#### *Cross Examination*

BY MR. JOY:

Q. That same morning, June 20th, Ms. Meucci, when you first appeared on Lechmere property, was that prior to going over to the Grossman's parking lot?

A. No.

Q. Isn't it true that you were on the Lechmere property, were asked to leave, went over to the Grossman's parking lot, and then came back and were visited as you just sited yourself?

A. No.

[251] Q. Do you know if others in your group, representatives of the union had, prior to meeting in Grossman's parking lot that morning, had been inside Lechmere's property?

A. No. I met everybody in the Bradlee's parking lot across from Lechmere.

Q. Yes, and then you came over to Lechmere?

A. Then I got in my car and drove around, and drove my car to Grossman's parking lot.

Q. And where were the others that you had met at Bradlee's parking lot?

A. In Bradlee's. We all met there.

Q. Yes, and where did they go?

A. Two cars went over to Grossman's, and we walked from Grossman's up the grassy knoll to Lechmere.

Q. Do you know if the people in the other car had been on Lechmere property that morning?

A. No. By the time I had arrived they were sitting in their car at Bradlee's —

JUDGE BIBLOWITZ: So you don't know?

THE WITNESS: No, I don't.

MR. JOY: I have no further questions.

JUDGE BIBLOWITZ: Thank you, Ms. Meucci. Next rebuttal witness?

MR. MEIKLEJOHN: General counsel recalls Giovanni Cassarino.

[252] JUDGE BIBLOWITZ: Mr. Cassarino? Mr. Cassarino, you are also still under oath, since you were sworn in yesterday. Mr. Meiklejohn?

*Direct Examination*

BY MR. MEIKLEJOHN:

Q. On June 20th you went to Lechmere's Plaza to distribute leaflets at the entrance. Did you, or anyone in your group, go onto the dog leg grassy area?

A. No, we didn't.

MR. MEIKLEJOHN: That's all.

*Cross Examination*

BY MR. JOY:

Q. How far away were you from the police cruiser?

A. I was not close at all to the police cruiser. I was close to the curb on the highway.

Q. How far away were you from the police cruiser?

A. The police cruiser was parked over there. About 25 to 30 feet away from me.

JUDGE BIBLOWITZ: And the police cruiser was parked where? Can you show us on the map?

THE WITNESS: Probably along here.

JUDGE BIBLOWITZ: Right where the E and the M are, where it says employee.

BY MR. JOY:

Q. Mr. Cassarino, did you meet in the Grossman's parking [253] lot, the rest of the people?

A. No, we met in the Bradlee's parking lot, the four of us. Then we took two cars and we went across the street to the Grossman's parking lot. One guy crossed the highway to get to the other side.

Q. Okay, so you drove in one of the cars?

A. Yes, I was with another guy.

Q. Let me finish my question. You drove from Bradlee's in one of the automobiles?

A. Yes.

Q. And where did you first go?

A. To the Grossman's parking lot.

Q. You didn't stop and go on the Lechmere property first?

A. Not at all.

Q. At you been on the Lechmere property at any time that morning?

A. No.

Q. When you met in the Grossman's parking lot, do you know if any of the people you met there had, prior to that time, that day, been leafleting on the Lechmere parking lot?

A. Not at all. I don't know that.

Q. You don't know that?

A. No.

Q. Did you talk to them?

[254] A. No.

Q. Was there any conversation about some of them having just come from the Lechmere parking lot, and being asked to leave because they were leafleting in the parking lot?

A. No.

Q. You don't recall that?

A. Not at all. Nobody ever told me about that.

Q. And you are telling me under oath that you have no knowledge as to whether any of the people — let me have a moment, I'll get the names.

JUDGE BIBLOWITZ: I think he's testified to that twice already, that he doesn't know. That no one ever said that to him.

BY MR. JOY:

Q. So it's your testimony that at 9:20 A.M. on 6/20/87 you were not in the Lechmere parking lot leafleting cars?

MR. MEIKLEJOHN: Objection.

A. I was not.

Q. And do you know if Joseph Gagnon was?

A. I don't know.

Q. How about Mark Espinosa?

A. I don't think so, because I think Mark came after. He met us in the parking lot.

MR. JOY: No further questions.

JUDGE BIBLOWITZ: Thank you. Again, Mr. Cassarino, you [255] are excused.

That's it for rebuttal?

MR. MEIKLEJOHN: That's it, Your Honor.

\* \* \*



## JOINT EXHIBIT NO. 1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUBREGION 39

LECHMERE, INC.

and

LOCAL 919, UNITED FOOD AND COMMERCIAL WORKERS,  
AFL-CIO

## STIPULATION OF FACTS

1. LECHMERE, INC. is an employer engaged in the sale of retail goods.
2. During the 12-month period ending August 31, 1987, Lechmere in the course of its business operations derived gross income in excess of \$500,000 and is now and at all times material engaged in commerce within the meaning of the Act.
3. Lechmere, Inc. opened a retail store in Newington, Connecticut in November, 1986 located on the Berlin Turnpike. The store is located on a parcel of land bounded on the east by the Berlin Turnpike and on the north by Pascone Street. The parcel measures approximately 880 feet from north to south and 740 feet from east to west. The Lechmere store is located at the south end of the property. A main parking lot is to the north of the store and extends to Pascone Street. A smaller parking lot is located to the east of the store. A strip of 13 smaller "satellite stores" runs along the west side of the parcel facing the parking lot. As of June 1987, only about 4 of these stores were occupied. These stores are not owned by Lechmere, and are approximately 100 feet from the Lechmere store at the nearest point. There are two public pay telephones located in front of the satellite stores. Ownership of the parcel of land is divided among Lechmere and Newington Commer-

cial Associates Limited Partnership. Lechmere owns the land occupied by and immediately surrounding its store. Newington Commercial owns the satellite stores. The remainder of the parking lot is jointly owned by Lechmere and Newington Commercial. Konover Management Corporation, a general partner in Newington Commercial Associates, has management responsibility for the satellite stores. Lechmere obtained a letter from Konover dated June 26, 1987 authorizing Lechmere to use "reasonable, lawful means to prevent distribution of hand bills, flyers, etc. within the shopping center." A grassy strip approximately 46 feet wide runs the entire length of the property along the Berlin Turnpike, with the exception of 2 breaks in that strip for entrance to the parcel. The 42 foot width of that grassy strip along the Berlin turnpike is public property. The remainder of the grassy strip is Lechmere's property.

4. Access to the parcel of land may be had through the main entrance off the Berlin Turnpike. That entrance opens directly onto a roadway which passes the front of the Lechmere store. The main set of doors to the store is on the north side of the building facing that roadway and the main parking lot. A set of doors to the east side of the store faces the smaller parking lot. This set of doors is identified as package pickup. There are also entrances to the parcel of land from Pascone Street entering the main parking lot, and from the Berlin Turnpike at the rear of the Lechmere store. Joint Exhibit 2 is a diagram of the parcel of land on which the Lechmere Newington store is located.

5. There is a sign at the main entrance to the parcel of land which identifies two of the stores on the parcel, "Lechmere" and "Card Gallery." There are no signs in the parking lot announcing any restrictions on access to or use of the parking lots other than signs identifying certain parking spaces as "Handicapped Parking." There are two 6" by 8" signs on each set of doors to the Lechmere store which reads, "TO THE PUBLIC."

No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises."

6. The Berlin Turnpike is a 4-lane divided highway which runs from Wethersfield, Connecticut to Meriden, Connecticut, a distance of approximately 15 miles. The speed limit on the Berlin Turnpike outside the parcel of land in question is 50 M.P.H.

7. Lechmere, Inc. established a No Solicitation/No Distribution policy in 1982.

8. The policy was amended in March, 1986 to change the word "employee" to "associate" and to put it into the format of standard operating procedures.

9. The contents of the policy are attached hereto as Joint Exhibit 3.

10. The policy was in effect at all times material herein.

11. As of June 1987, Lechmere employed approximately 200 employees at the Newington store.

12. The charging party placed full page and quarter page advertisements in the Hartford Courant on June 16, 26, 29, 1987, July 2, 1987, and August 3, 1987 and in the New Britain Herald on July 9, 1987 aimed at Lechmere employees. (Copies are attached as Joint Exhibit 4A-F).

13. The charging party placed full or quarter-page advertisements in the Hartford Courant aimed at the general public on August 17 and 25 and September 2, 7, and 17, 1987. (Copies are attached as Joint Exhibit 5A-F).

14. Representatives of the charging party picketed on the grass area between Lechmere's parking lot and the Berlin Turnpike as follows:

- a. August 7-31, 1987
- b. September 1-5, 1987
- c. October, 1987 — once a week
- d. November, 1987 — once a week
- e. December, 1987 — once a week
- f. January, 1988 — 6 times

g. February, 1988 — 5 times

h. March, 1988 — 2 times

15. Representatives of the Charging Party were never asked to leave the grass area on which they picketed on any of the dates described above in paragraph 14.

16. On July 23, 1987, Lechmere placed a video camera on the roof of the Newington store near the northeast corner of the roof. The camera is capable of being rotated and the camera angle can be raised or lowered so that the camera can be directed at any point in the main parking lot or the small lot to the east of the Lechmere store. The camera can be monitored by security guards within the store, and Lechmere's has the necessary equipment to record on videotape from the camera.

S/THOMAS W. MEIKLEJOHN

THOMAS W. MEIKLEJOHN  
*Counsel for the General Counsel*

S/J. WILLIAM GAGNE, JR.

J. WILLIAM GAGNE, JR., ESQ.  
*Counsel for Local 919, United  
Food and Commercial Workers,  
AFL-CIO*  
J. WILLIAM GAGNE, JR., ESQ.

S/ROBERT P. JOY

ROBERT JOY, ESQUIRE  
COUNSEL FOR LECHMERE, INC.

[This page intentionally left blank]

OVERSIZE FOLDOUT(S) FOUND HERE IN  
THE PRINTED EDITION OF THIS VOLUME  
ARE FOUND FOLLOWING THE LAST PAGE  
OF TEXT IN THIS MICROFICHE EDITION.

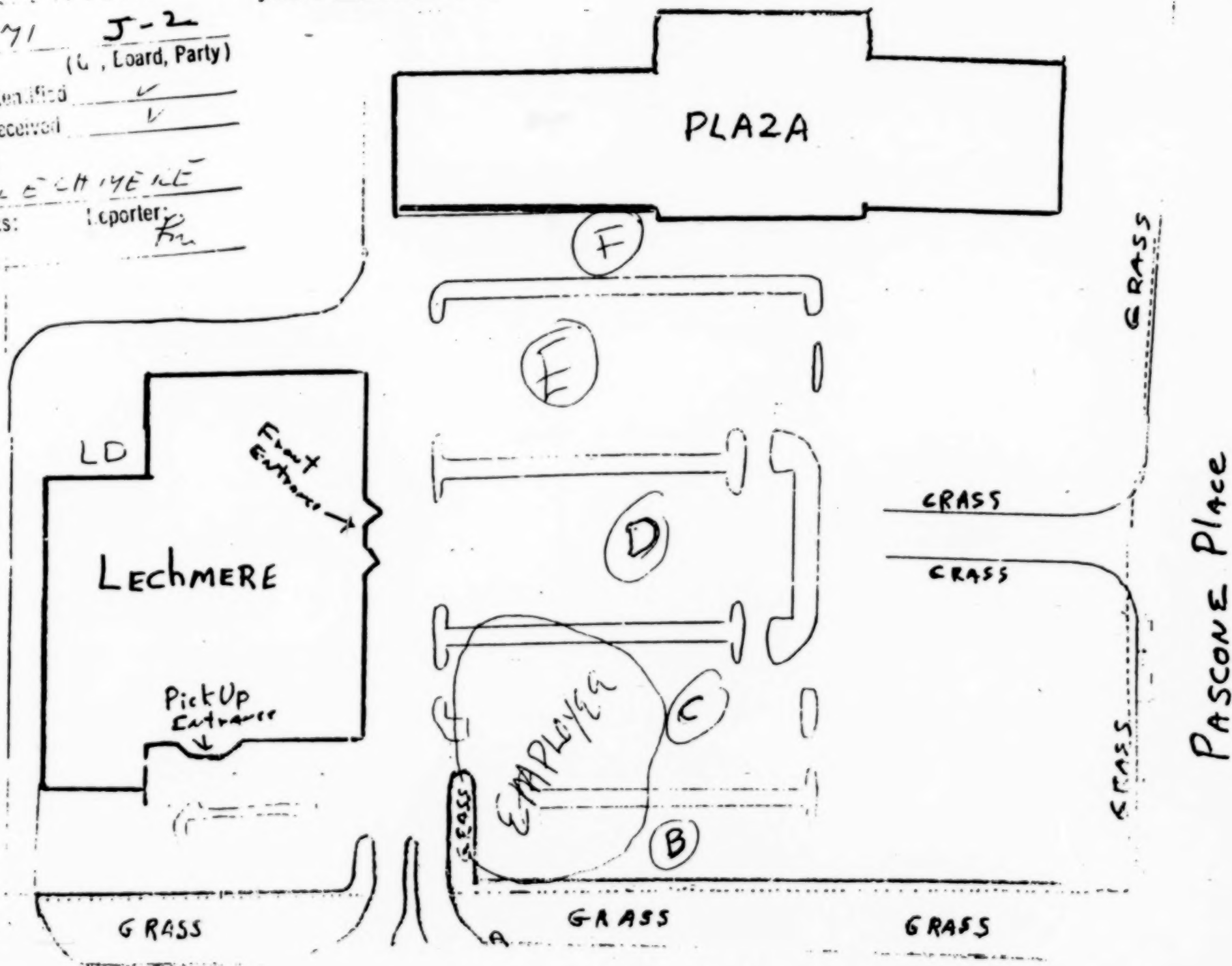
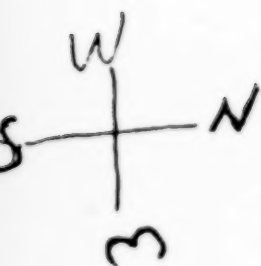
SEE FOLDOUT NO 1





## JOINT EXHIBIT NO. 2

29-CA-2571 J-2  
 (L, Loard, Party)  
 Disposition: Identified ☒  
 Rejected ☐ Received ☒  
 IN THE MATTER OF:  
 NICK - LECHMERE  
 Date: 5-16-88 Witness: Reporter: R  
 No. Pages:



BERLIN Turnpike

JOINT EXHIBIT NO. 3

LECHMERE: POLICY & PROCEDURE ISSUE

To: Distribution

Issue Date:

From: Policy & Procedure Department

Effective Date: Draft

Attached is new/revised Standard Operating Policy and Procedure number 03-03-22

Please include in the appropriate manual volume. Remove and destroy previously issued Policy and Procedure Number(s) 03-03-22 dtd 7/82 as well as Bulletin Number(s) None

Attached is revised S.O.P. 03-03-22, *No Solicitation Policy.*

The only content change in this policy was the word "employee" was changed to "associate". It was also put into the new S.O.P. format.

Please review this policy with all associates.

Remove the policy dated 7/82 and replace it with the attached.

Tom Boyden, Director Personnel Relations, LGO-275, x522

Resource person and extension to call with questions regarding policy & procedure content.



## STANDARD OPERATING POLICY &amp; PROCEDURE

SUBJECT: NO SOLICITATION POLICY    SOP NO. 03-03-22  
 CHAPTER: EMPLOYEE RELATIONS    PAGE: 1 of 1  
 SECTION: PERSONNEL    DISTRIBUTION: GENERAL  
 EFFECTIVE: 2/86    SUPERSEDES: NEXT REVIEW DATE: 2/87  
 EXECUTIVE SPONSOR: Director Personnel Relations

## I. POLICY

Solicitation of associates in the work areas during working time is strictly prohibited. It is strictly prohibited in all selling and public areas at all times. Non-working time includes break periods, meal periods and other specified periods during the work day when associates are properly not engaged in performing their work tasks. Distribution of literature in work areas and public selling areas is prohibited.

Non-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

Violations of this policy must be reported immediately to a Manager or other appropriate executive. Violations will be handled in accordance with S.O.P. 03-03-35, *Violations of No Solicitation Policy*. Disciplinary action may be imposed in accordance with S.O.P. 03-03-08, *Discipline*.

## II. OPERATIONS/FUNCTIONS AFFECTED

All Lechmere Associates and Operations

## III. PROCEDURE/RESPONSIBILITIES

None

## IV. EXHIBITS/FORMS USED

None

## V. RELATED INFORMATION

S.O.P. 03-03-35, *Handling Violations to No Solicitation Policy*

S.O.P. 03-03-08, *Discipline*

APPROVED: s/ C. GEORGE SCALA    DATE: 3/12/86  
 C. George Scala,  
 Chairman/CEO and President

APPROVED: s/ PAUL H. CHADDOCK    DATE: 3/11/86  
 Paul H. Chaddock,  
 Sr. V.P. Personnel

## GENERAL COUNSEL'S EXHIBIT NO. 1

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

Case 39-CA-3571

Date Filed July 21, 1987

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

## 1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

Lechmere, Inc.

b. Number of workers employed

c. Address (street, city, state, ZIP code)

1305 Berlin Turnpike, Newington, CT.

d. Employer Representative

e. Telephone No.

666-4550

f. Type of Establishment (factory, mine, wholesaler, etc.)

Retail

g. Identify principal product or service

Sales

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) \_\_\_\_\_ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 17, 1987, the above-named Employer through its officers, agents and employees has threatened, coerced and intimidated employees in violation of Section 8(a)(1) of the Act.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing (if labor organization, give full name, including local name and number)

Local 919, U.F.C.W., AFL-CIO

4a. Address (street and number, city, state, and ZIP code)

264 Farmington Avenue, Htfd, CT. 06105

4b. Telephone No.

525-9333

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

Local 919, United Food &amp; Commercial Workers, AFL-CIO

## 6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By s/ J. WILLIAM GAGNE  
207 Washington Street  
Hartford, CT. 06106

Attorney

(203) 522-5049  
July 21, 1987

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 39

[CAPTION OMITTED]

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 919, United Food and Commercial Workers, AFL-CIO, herein called the Union, that Lechmere, Inc., herein called Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, herein called the Board, by the undersigned, pursuant to Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Union on July 21, 1987, and a copy thereof was served by certified mail on Respondent on July 22, 1987.

2. At all times material herein, Respondent, a Massachusetts corporation with an office and place of business in Newington, Connecticut, herein called its Newington facility, has been engaged in the retail sale of consumer goods.

3. During the 12-month period ending August 31, 1987, Respondent, in the course and conduct of its business operations described above in paragraph 2, derived gross revenues in excess of \$500,000.

4. During the 12-month period ending August 31, 1987, Respondent, in the course and conduct of its business oper-

ations described above in paragraph 2, purchased and received at its Newington facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Connecticut.

5. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, Roger Samualson occupied the position of Respondent's Newington Store Manager and is now, and has been at all times material herein, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

8. Since on or about June 14, 1987, Respondent has refused to permit representatives of the Union to engage in organizational picketing and handbilling in the parking area at its Newington facility.

9. On or about June 20, 1987, Respondent, acting through Roger Samualson, caused representatives of the Union to be removed from public property adjacent to the parking area at its Newington facility where they were attempting to distribute organizational handbills to occupants of vehicles.

10. Since on or about July 15, 1987, Respondent, by placing a revolving video camera on the roof of its Newington facility, has engaged in surveillance of its employees' union activities.

11. By the acts and conduct described above in paragraphs 8, 9 and 10, and by each of said acts, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.



12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, the General Counsel seeks an order providing that Respondent:

Notify the Officer-in-Charge for Subregion 39, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondents, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that commencing at 11 o'clock in the forenoon, Eastern Daylight Saving Time, on the 16th of May, 1988, and on consecutive days thereafter, a hearing will be conducted at One Commercial Plaza, 21st Floor, Hartford, Connecticut, before a duly designated administrative law judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned, acting in this matter as an agent of the National Labor Relations Board, an original and six (6) copies of an answer to said complaint with 14 days from the issuance thereof, and that, unless it does so, all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board. You are also notified that pursuant to said Rules and Regulations, Respondent shall serve a copy of the answer on each of the other parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at Hartford, Connecticut, this 18th day of November, 1987.

s/ PETER B. HOFFMAN

Peter B. Hoffman,

Officer-in-Charge

National Labor Relations Board

Subregion 39

Hartford, Connecticut

Attachments

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 39

[CAPTION OMITTED]

RESPONDENT'S ANSWER

Lechmere, Inc., hereinafter called Respondent, for its answer to the Complaint says that it:

1. Admits the allegations contained in paragraph 1 on the Complaint.
2. Admits the allegations contained in paragraph 2 of the Complaint.
3. Admits the allegations contained in paragraph 3 of the Complaint.
4. Admits the allegations contained in paragraph 4 of the Complaint.
5. Admits the allegations contained in paragraph 5 of the Complaint.
6. Admits the allegations contained in paragraph 6 of the Complaint.
7. Admits the allegations contained in paragraph 7 of the Complaint.
8. Admits the allegations contained in paragraph 8 of the Complaint.
9. Denies the allegations contained in paragraph 9 of the Complaint.
10. Denies the allegations contained in paragraph 10 of the Complaint.
11. Denies the allegations contained in paragraph 11 of the Complaint.
12. Denies the allegations contained in paragraph 12 of the Complaint.

WHEREFORE, Respondent denies that it committed the unfair labor practices alleged, opposes any remedy and prays that the Complaint be dismissed in its entirety.

Respectfully submitted,

LECHMERE, INC.

BY s/ ROBERT P. JOY  
Robert P. Joy  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666

Dated: November 30, 1987

[CERTIFICATE OF SERVICE OMITTED]

[This page intentionally left blank]



OVERSIZE FOLDOUT(S) FOUND HERE IN  
THE PRINTED EDITION OF THIS VOLUME  
ARE FOUND FOLLOWING THE LAST PAGE  
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 2-3

## GENERAL COUNSEL'S EXHIBIT NO. 4

[LECHMERE — LETTERHEAD]

Dear Lechmere Associate:

I wish to continue our communications regarding the union's activities directed toward our Newington associates and to reiterate Lechmere's philosophy toward unions.

As we have mentioned previously, Lechmere is proud of its practice of maintaining an open and honest relationship with associates. We place great value on having the ability to communicate and deal directly with you — something that typically doesn't occur if there is a third party such as a union involved.

Because of our philosophies as a company, no Lechmere associates — and we now have 17 stores — have found it necessary to engage a union to represent them.

The union has several approaches to reach associates. I'd like to speak briefly about each of these:

*Distribution of Literature*

On several occasions, union representatives have distributed handouts in the store and in our parking lot. Inasmuch as Lechmere's policies do not permit solicitation or distribution by non-associates on company property, we have asked people engaged in this type of activity to leave. We feel we have an obligation to maintain an environment free of interruption and inconvenience for both our customers and our associates.

*Newspaper Ads*

You may have noticed the coupons that have appeared in the newspaper ads and literature. I'd like to make you aware of the significance of them. They are, in fact,

union authorization cards. Signing them means that you are authorizing the union to represent you — thereby inserting an outside party between you and Lechmere.

Federal law does allow for an employee of a company who has turned a signed card into the union to revoke this authorization. You may contact the union and instruct them to revoke your authorization. If you have any problems, you may telephone the National Labor Relations Board in Hartford at 240-3522.

#### *Telephone Calls*

Several associates have mentioned to us about telephone calls they have received at home by union representatives and have been disturbed by this intrusion. I am sorry that your home life has to be interrupted by such calls. I can only suggest that if you don't wish to be called at home that you let the caller know. If the calls persist, contact the telephone company to determine what steps could be taken through them.

I have heard from a number of associates who have had experience with this union. They report that Lechmere is a much better place to work than their previous unionized company.

We also think that Lechmere is a good place to work. We believe in fair and competitive wages and benefits. Our working conditions are among the best in retailing. We believe in honest and open two-way communications.

Oh, this doesn't mean that occasionally there may be problems or associate issues, for they occur in any workplace. But we feel that with our philosophies towards associates that we can listen to those concerns and work through them with you.

I thank you for taking the time to read this letter. If you have any questions at all, I encourage you to ask me directly or to see one of the managers or supervisors. If we don't know the answer, we'll find out for you. I would even encourage you to share this letter with your family and friends. I think you will find that they may have had experiences similar to those mentioned above.

Again, thank for your interest

Very truly yours,

s/ ROGER SAMUELSON

Roger Samuelson  
General Manager

RS/mc



## RESPONDENT'S EXHIBIT NO. 3

[KONOVER - LETTERHEAD]

June 26, 1987

Tom Boyden  
 Lechmere  
 10 Commerce Way  
 Woburn, Massachusetts 01801

Dear Mr. Boyden:

This letter serves to confirm the telephone authorization you were given on June 22, 1987 which will allow Lechmere, until further notice, to represent the interests of Newington Commercial Associates Limited Partnership (owner of the satellite stores and part of the common areas of the Lechmere Shopping Center in Newington, Connecticut) with regard to using reasonable lawful means to prevent the distribution of hand bills, flyers, etc. within the shopping center. We, however, reserve the right to assume responsibility for this function at anytime in the future.

In the event that you need to reach our company, please contact our property manager, Patricia Russek, at the address or phone number above.

Very truly yours,

NEWINGTON COMMERCIAL ASSOCIATES  
 LIMITED PARTNERSHIP

By: Konover Management Corporation,  
 Its General Partner

By: s/ EDWARD M. YOUNGER  
 Edward M. Younger  
 Its President

EMY/lly

cc: Christopher M. Raphael

UNITED STATES OF AMERICA  
 BEFORE THE NATIONAL LABOR RELATIONS BOARD  
 [CAPTION OMITTED]

RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
 THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, Lechmere, Inc. ("Lechmere" or "Respondent") files its exceptions to the Decision and Order of Administrative Law Judge Joel P. Biblowitz dated September 30, 1988. Lechmere also submits herewith its Brief in Support of Exceptions, containing the complete grounds for its Exceptions.

Lechmere respectfully contends that Administrative Law Judge Biblowitz erred by the following acts:

I. EXCEPTION TO FACTS FOUND BY THE ADMINISTRATIVE LAW JUDGE.

A. *Background*<sup>1</sup>

1. Failing to find that there are no sidewalks along the Berlin Turnpike for pedestrian travel. (Dec., p. 2, lines 5-30; T. 23)

2. Finding that the main entrance roadway in front of the Lechmere store "ends at" the satellite stores, and finding that the delivery entrance roadway "connects to a loading dock at the rear" of Lechmere. (Dec., p. 2, lines 33-46) Failing to find that the main entrance roadway in front of Lechmere intersects with a roadway running in front of the satellite stores that is also a continuation of the delivery entrance roadway running behind Lechmere. Thus, vehicular traffic flows

<sup>1</sup> For convenience Lechmere will generally employ Judge Biblowitz's organization and more particularly his choice of headings to state its exception to his decision.

between the Lechmere store and the satellite stores. (T. 141-142; *and see* Jt. Ex. 2)

3. Failing to find that a low barrier of decorative trees and shrubbery separates the satellite stores from the parking area and the Lechmere store. (T. 178; *and see* Jt. Ex. 2)

4. Failing to find that there are no benches, chairs or other such inducements for customers to linger in front of the Lechmere store. (T. 171)

5. Failing to find that the two public telephones located in front of the satellite stores are at least 500 feet away from the Berlin Turnpike across the entire Lechmere Plaza parking area; that they are not visible from the Berlin Turnpike until drivers are directly in front of Lechmere Plaza; and that other pay phones are more accessible at several nearby locations. (Dec., p. 2, lines 18-19; T. 172-174; *and see* Jt. Ex. 2)

6. Failing to find an absence of any evidence that any members of the general public or any passers-by ever made use of the pay phones in front of the satellite stores. (*See* T. 95-96, 172-174)

7. Failing to find that there was minimal interchange of customers between Lechmere and the satellite stores in the summer of 1987. (T. 171; *and see* G.C. Brief, at 18, "While there is no evidence of significant pedestrian traffic between Lechmere's and the satellite stores . . .")

8. Failing to find that the satellite stores are specialized, such as a card shop and a Radio Shack. (T. 171-173)

9. Failing to find as a matter of fact that Lechmere Plaza contains no restaurants, bars, ice cream shops, convenience stores, or any other establishments that draw generalized or "impluse" clientele. (T. 171-172; *but see* Dec. at p. 9, lines 36-37, "Analysis")

10. Failing to find that there are no signs or barriers denoting an employee parking area or an employee entrance to the store. (Dec. p. 3, lines 2-4; T. 21-22, *and see* 143)

11. Failing to find that the parking lot lights are automatically shut off one-half hour after closing each night. (T. 175)

#### B. Events of June 18

12. Failing to find that Union organizers placed leaflets on cars parked in the informal employee parking area three different times on June 18, at approximately 10:00 A.M., 5:00 P.M., and another time in between (and thus, largely or entirely during store business hours). (Dec., p. 3, lines 43-46; p. 4, lines 2-4; T. 28-30, 37-38)

13. Failing to find that the Union organizers' first effort on June 18 involved entering the Lechmere store itself. (T. 187)

14. Failing to find that, when asked to leave Lechmere's property on June 18 and other days, the Union organizers did not do so immediately, although they did comply. (T. 32)

#### C. Events of June 20

15. Failing to find that the first Union efforts on June 20 involved two representatives driving into the parking lot, parking, and then placing literature on parked cars. (Dec. p. 4, lines 14-18, lines 36-40; p. 5, lines 12-15, lines 30-34; *but see* lines 48-50, continuing on p. 6, line 1; *and see* T. 188-189, 199-205, 230-232, 239)

16. Failing to find that Samuelson immediately wrote a summary of this incident in an "Incident Report" (T. 199-205, 239)

17. Failing to find that, after the Union representatives convened as a group, at about 9:47 A.M. they walked to Lechmere and entered the parking lot "dog leg" area up to 100 feet from the Berlin Turnpike on Lechmere's property, attempting to hand literature to entering cars. (Dec., p. 4, lines 14-21, lines 38-40; p. 5 lines 14-16, lines 33-35; *but see* p. 6, lines 1-6; *and see* T. 189-191, and Jt. Ex. 2)



18. Finding the the four Union representatives all stood within about four feet of the Berlin Turnpike at all times during the incident in question, in the face of evidence (much undisputed) that they showed no such restraint on numerous other occasions before and after, even minutes earlier and later again the same day. (Dec., p. 4, lines 18-20, 38-40; p. 5, lines 15-16, lines 33-34; *but see* p. 6, lines 1-5; and T. 28-30, 32-35, 37-38, 57, 61-62, 176-177, 187, 188-189, 199-205, 230-231)

19. Failing to find that as Samuelson first approached the group of Union representatives they were not within a few feet of the Berlin Turnpike on public property, but were instead on Lechmere property moving back down the "dog leg" toward the Berlin Turnpike. (T. 234-235)

20. Failing to find that the Union representatives engaged Samuelson in a debate about Lechmere's property line that was largely focused on their right to be on the grassy "dog leg." (See T. 190-191, 236-237)

21. Finding that Samuelson told the police that the Union representatives were trespassing on his property and he wanted them to leave; failing to find that Samuelson said, "These people are trespassing on Lechmere property, and I would like them to leave our property." (Dec., p. 6, lines 11-12; T. 192)

22. Failing to find that Samuelson immediately accepted the police officer's instructions and left the scene, and that for months thereafter the Union representatives met no interference when they remained on public property near the Berlin Turnpike. (Dec., p. 6, lines 20-23; *but see* Dec., p. 8, lines 11-13; *see also* Stipulation of Facts, paras. 14 and 15; T. 50, 65-66, 110, 122, 130, 134, 192-193)

23. Failing to find that Samuelson's efforts on the morning of June 20, 1988 had no effect on the Union's representatives initially, nor did it influence their eventual decision to leave, and that they finally left of their own accord and for no

other reason. (Dec., p. 4, lines 33-34; p. 5, lines 7-10, lines 28-30, 43-46; p. 6, line 20; *and see* T. 41, 50, 65-66, 105-106, 107-108, 110, 116-118, 121-122, 127-130, 134)

24. Failing to find that there was no evidence that any employee saw, heard, or was in any way affected by the incident on the morning of June 20. (Dec., pp. 3-6 generally)

25. Failing to find that, in defiance of police instructions, Lisa Meucci and perhaps other Union representatives returned later on June 20 and again handbilled in the parking lot and in the store. (T. 61-62)

26. Failing to find that Union witness Lisa Meucci gave false sworn testimony in her investigatory affidavit to the Board (later toned down in her sworn oral testimony), to the effect that Officer Gallagher ordered the Union representatives to leave the scene. (T. 50-51)

27. Crediting the testimony of Union witness Gagnon that Samuelson claimed that Lechmere owned the entire "grassy strip," to the edge of the Berlin Turnpike. (Dec., p. 5, lines 36-38, *and see* p. 10, lines 10-11, "Analysis.")

#### D. Other Union Attempts To Contact Employees.

28. In any respect giving weight to the hearsay testimony by Union witness Meucci concerning telephone conversations with Lechmere employees in which "parents would intervene." (Dec., p. 6, lines 40-41)

29. Failing to find that at least one Lechmere employee provided the Union with names and addresses of co-workers. (Dec., p. 7, lines 1-5; T. 76-77)

30. Failing to find that the Union created a computerized mailing list of Lechmere employees at Newington. (Dec., p. 7, lines 1-5; T. 76-77)

31. Failing to find that, in addition to all other sources of information, Lechmere itself notified its employees about the Union's organization effort by a letter dated July 1. (Dec., p. 6, lines 34-41; p. 7, lines 1-9; *and see* G.C. Ex. 4)



32. Failing to find that Lechmere employees complained about the Union's newspaper advertisements, mailings, and home visits. (Dec., p. 7, lines 1-5; T. 183-184)

33. Failing to find that on some days the Union left leaflets across the entire parking lot, beyond Lechmere's property. (See Dec., pp. 3-7 generally; T. 28-29, 176-177)

34. Failing to find that customers complained to Lechmere about Union leaflets left on their cars. (See Dec., pp. 3-7 generally; T. 221)

#### E. Prior Enforcement Of No-Solicitation.

35. Finding that the store opened in November 1966 (which is undoubtedly just a typographical error). (Dec., p. 7, line 15; see Stipulation of Facts, para. 3)

36. Failing to find that Lechmere employees, including Samuelson, are all informed about the no solicitation policy during orientation immediately after they are hired. (Dec., p. 7, lines 13-42; see T. 165-169, 207-213)

37. Failing to find that, in addition to specific incidents described in the decision, Samuelson has rejected numerous other telephone requests to solicit on Lechmere's property for raffles, bake sales, and the like. (Dec., p. 7, lines 13-28; see T. 161-162)

38. Failing to find that Lechmere's uniform, prophylactic enforcement of its no solicitation policy permitted no inference that Union animus motivated Lechmere in the incidents underlying the Complaint. (Dec., p. 7, lines 13-28; see T. 145-153, 161-162, 169-170, 210-213, 219-220)

#### II. EXCEPTIONS TO THE ANALYSIS OF THE ADMINISTRATIVE LAW JUDGE.

39. Finding that on June 18, between 9:30 and 10:00 A.M., the Union representatives' first effort was to place handbills on parked cars. (Dec., p. 8, lines 30-36; see Exception No. 13 above)

40. Failing to find that the *Fairmont Hotel* formula should be modified to conform more precisely to *N.L.R.B. v. Babcock & Wilcox* and other Supreme Court precedent. (Dec., pp. 8-10 generally)

41. Failing to find that *N.L.R.B. v. Babcock & Wilcox* is the highest controlling precedent and dictates dismissal of the allegation that Lechmere unlawfully barred the Union from the parking lot. (Dec., pp. 8-10 generally)

42. Finding that the Union's Section 7 rights were more compelling than Lechmere's property rights. (Dec., p. 9, lines 4-5)

43. Finding that the Union's activity involved little likelihood of affecting customers because the Union placed handbills on cars "only" in the informal employee parking area, and generally did so before 10:00 A.M. (Dec., p. 9, lines 10-14) Failing to find that Union representatives repeatedly entered the store during business hours, and on other occasions left handbills across the entire parking lot, and further, that often during business hours the Union representatives had no method to determine which cars belonged to employees in an area in which customers also routinely parked. (See T. 28-30, 32-35, 37-38, 57, 62, 176-177, 187, 188-189, 199-205, 230-231; and see Exceptions Nos. 13, 14, 18, 25, 33, 34, *supra*, and 49, 55 and 64, *infra*)

44. Finding that Lechmere had less-than-compelling property rights. (Dec., p. 9, lines 14-15)

45. Finding any significance to the fact that Lechmere posted no signs at the entrance to the parking lot limiting entry in any way. (Dec., p. 9, lines 17-18)

46. Finding that Lechmere more resembled an open shopping mall than a single store, surrounded by its own parking lot. (Dec., p. 9, lines 30-40)

47. Finding that it is unnecessary to consider whether reasonable alternative means existed for the Union to communicate with Lechmere's employees. (Dec., p. 9, lines 42-44)

48. Finding that Union representatives were unable to converse with Lechmere employees arriving at work. (Dec., p. 9, lines 48-49)

49. Failing to find, in Judge Biblowitz' consideration of "reasonable alternative means," that the General Counsel (and not Lechmere) carried the burden of showing that methods other than trespassing did not exist, and that the General Counsel did not in this case meet that burden. (Dec., p. 9, lines 42-50; p. 10, lines 1-6; *and see* G.C. Brief, at 23-24)

50. Crediting the testimony of the four Union representatives *in toto* over that of Roger Samuelson concerning events on the morning of June 20, in the face of numerous undisputed facts indicting that the Union representatives presented a coordinated and contrived story. (Dec., p. 10, lines 8-11 *and see* Exceptions 15-27, above)

51. Finding that it was "reasonable" to believe that the Union representatives solicited only on public property on the morning of June 20 because they had been "rebuffed" before, in the face of ample evidence that, despite Lechmere's requests, they showed no such restraint on other occasions, even earlier and again later on the same day. (Dec., p. 10, lines 11-13; *see* Exception 18 above)

52. Failing to find that, although Samuelson did tell Union representatives to leave "Lechmere property" while they were standing on public property, they had only seconds before been well on to Lechmere property. (Dec., p. 10, lines 23-25 *and see* Exception 18-20, above)

53. Finding that Samuelson violated Section 8(a)(1) by attempting to cause the Union agents to be removed from public property on June 20. (Dec., p. 10, lines 28-30)

54. Failing to find that Samuelson's actions on June 20 did not rise to the level of a violation of Section 8(a)(1) because the violation, if any, was *de minimus*. (Dec., p. 10, lines 28-30, *and see* Exceptions 15-27, above)

55. Failing to find that Samuelson's actions on June 20 did not rise to the level of violation of Section 8(a)(1) because the violation, if any, was immediately, effectively, and permanently "cured." (Dec., p. 10, lines 28-30; *and see* Exceptions 15-27, above)

56. Finding that "peaceful union activity cannot be a motivating factor in an employer's institution of a videotaping system;" failing to find that trespassory union activity, even if "peaceful," can be a lawful motivating factor for photographic surveillance. (Dec., p. 10, lines 39-40; *see* *Benton Kirshner, Inc.*, 209 N.L.R.B. 1081 (1974), *enf.* 523 F.2d 1046, 90 LRRM 2958 (9th Cir. 1975))

57. Finding that "there is certainly no evidence that [Union representatives] harassed customers [on June 18] or at any time prior to July 23," in the face of undisputed evidence that Union representatives repeatedly entered the store during business hours, including incursions into public restrooms, and that they left handbills on cars not belonging to employees; and further, in the face of Judge Biblowitz' rulings to exclude certain evidence (discussed below). (Dec., p. 11, lines 4-5; *and see* T. 52-58, 62, 124-125, 134-135, 186-188, 193-194)

### III. EXCEPTIONS TO THE CONCLUSIONS OF LAW BY THE ADMINISTRATIVE LAW JUDGE

58. Finding that Lechmere violated Section 8(a)(1) of the Act by refusing to allow the Union representatives to engage in organizing and handbilling in the store's parking lot and by attempting to cause the Union representatives to be removed from a public area adjacent to the parking lot. (Dec., p. 11, lines 20-23)

### IV. EXCEPTIONS TO THE REMEDY PROPOSED BY THE ADMINISTRATIVE LAW JUDGE.

59. Requiring Lechmere to cease and desist from refusing to allow Union representatives to engage in organizing and



handbilling in the store's parking lot. (Dec., p. 11, lines 29-30)

60. Requiring Lechmere to take certain affirmative action designed to effectuate the policies of the Act. (Dec., p. 11, lines 30-31)

#### V. EXCEPTIONS TO THE ORDER RECOMMENDED BY THE ADMINISTRATIVE LAW JUDGE.

61. Requiring Lechmere to cease and desist from prohibiting union representatives from distributing union literature to its employees in the parking lot adjacent to its store in Newington, Connecticut. (Dec., p. 11, lines 39-43, p. 12, lines 1-3)

62. Requiring Lechmere to cease and desist from threatening union representatives with arrest for distributing union literature to its employees in the parking lot adjacent to its store in Newington, Connecticut. (Dec., p. 11, lines 39-43, p. 12, lines 2-3)

63. Requiring Lechmere to cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act (because Lechmere has not done so). (Dec., p. 12, lines 7-8)

64. Requiring Lechmere to take the affirmative action described in the Administrative Law Judge's decision. (Dec., p. 12, lines 10-23)

65. Lechmere excepts to the Notice proposed by the Administrative Law Judge in its entirety, consistent with the exceptions set forth herein.

#### VI. EXCEPTIONS TO EVIDENTIARY RULINGS BY THE ADMINISTRATIVE LAW JUDGE.

66. Lechmere excepts to Judge Biblowitz' refusal to accept evidence concerning the Union representatives on and after June 18 repeatedly entering the store, and among other things, confronting employees, distributing literature, stuffing

literature into merchandise, entering warehouse areas not open to the public, leaving literature in public restrooms, and causing disturbances by refusing to leave when asked. (See T. 52-58, 62, 124-125, 134-135, 186-188, 193-194) Lechmere contends that this evidence has an important bearing on each major allegation in the Complaint: denial of access to the parking lot, the events of June 20, and the placement and use of the video camera.

67. Lechmere excepts to Judge Biblowitz' refusal to accept evidence concerning the simplicity of the procedure in Connecticut for obtaining from a license plate number the name and address of the registered owner of an automobile. (See T. 182-183) Lechmere contends that this evidence is directly relevant to the issue of "reasonable alternative means of communication."

68. Lechmere excepts to Judge Biblowitz' refusal to accept evidence concerning the nature and frequency of the Union's activity at the Newington store on and after August 7, and the evidence that this activity was informational picketing aimed at the general public rather than organizing activity. (See T. 79-81, 135-137, 194) Lechmere contends that this evidence is directly relevant to these issues: "reasonable alternative means of communication"; whether the June 20 incident involved no violation of the Act because it was *de minimis*, or was "cured"; and finally, the extent of the remedy, if any.

Respectfully submitted,  
LECHMERE, INC., *Respondent*  
By its Attorneys,  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666

Dated: October 27, 1988

By s/ ROBERT P. JOY  
Robert P. Joy  
By s/ KEITH H. McCOWN  
Keith H. McCOWN

[CERTIFICATES OF SERVICE OMITTED]



SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK  
WASHINGTON, D.C. 20543

March 18, 1991

Mr. Robert P. Joy  
Morgan, Brown & Joy  
One Boston Place  
Boston, MA 02108

Re: Lechmere, Inc. v.  
National Labor Relations Board  
No. 90-970

Dear Mr. Joy:

The Court today entered the following order in the above  
entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

s/ WILLIAM K. SUTER  
William K. Suter, *Clerk*



# LECHMERE

**A  
T  
T  
E  
N  
T  
I  
O  
N**

**E  
M  
P  
L  
O  
Y  
E  
E  
S**

**WHY  
PAY UNION  
DUES ???**

**WISE WORKERS  
SAY:**

**"We Pay Union Dues"  
BECAUSE ...**

**IT DOESN'T COST: IT PAYS  
To Belong To  
Local 919**



A.F.L. C.I.O.

**NOT**

*belonging is expensive.*



**Compare**

WITHOUT A UNION

WITH A UNION

???

- HIGHER WAGES
- MEDICAL EXPENSE BENEFITS
- VISION CARE BENEFITS
- CREDIT UNION SERVICES
- PAID PRESCRIPTIONS BENEFITS
- LIFE INSURANCE
- DENTAL EXPENSE BENEFITS
- WEEKLY DISABILITY PAY
- SURGICAL EXPENSE BENEFITS
- MOBILE HEALTH-CARE EXAMINATION
- PENSION PLAN
- MATERNITY EXPENSE BENEFITS
- HOSPITAL EXPENSE BENEFITS
- DIAGNOSTIC X-RAY AND LABORATORY
- SCHOLARSHIP AWARDS
- ACCIDENTAL DEATH & DISMEMBERMENT
- PHYSICIANS EXPENSE BENEFITS
- SUPPLEMENTARY ACCIDENT BENEFITS
- VACATIONS, GRIEVANCE PROCEDURES,
- PAID HOLIDAYS, PAID SICK LEAVE,
- Rest Periods with Pay
- Leave of Absence
- Wages
- Ambulance Service
- Wearing Apparel and Tools
- Holidays
  - New Year's Day
  - Washington's Birthday
  - Memorial Day
  - Independence Day
  - Labor Day
  - Thanksgiving Day
  - Christmas Day
  - Birthday Holiday
  - Personal Holidays
  - Anniversary Date of Employment
- Sick Leave with Pay
- Severance Pay
- Anesthesia
- No Discrimination
- Safety
- Work Schedules
- Death in Family
- Injuries
- Jury Duty
- Inspection of Payroll Records
- Time Clocks
- Bulletin Boards
- Privileges
- Registers
- Military Duty
- No Individual Agreements
- Visiting Stores
- Hours
- Vacations
- Validity

Pregnancy Leave of Absence • Grievance and Arbitration • Wage Statement • Seniority • Union and Security • Psychotherapy  
• No Polygraph Tests • First Aid Kit • Employees' Lounge • Recognition & Bargaining Unit • No Reduction in Wages

**MAIL  
TODAY**

**UNITED FOOD AND COMMERCIAL WORKERS UNION**  
**LOCAL 919**  
264 FARMINGTON AVENUE HARTFORD, CONNECTICUT 06105  
PHONE (203) 525-9333  
OUTSIDE LOCAL DIALING AREA 1-800-842-2215

**A.F.L. C.I.O.**

**AUTHORIZATION FOR REPRESENTATION**

Desiring to enjoy the rights and benefits of collective bargaining I the undersigned employee of \_\_\_\_\_

at \_\_\_\_\_ hereby authorize United Food & Commercial Workers International Union, AFL, CIO or its chartered Local Union to represent me for purposes of collective bargaining respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

**NO INITIATION FEE - NO DUES UNTIL A CONTRACT IS SIGNED**

DATE \_\_\_\_\_ SIGNATURE OF EMPLOYEE \_\_\_\_\_

Please PRINT Your Social Security Number \_\_\_\_\_

Your Name \_\_\_\_\_ Your Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_ Home Phone Number \_\_\_\_\_

Your Department Name \_\_\_\_\_ Your Shift: DAY ☐ NIGHT ☐ Your Job Title \_\_\_\_\_ Dept. No. \_\_\_\_\_

Date Hired \_\_\_\_\_ Your Present Rate of Pay \_\_\_\_\_ (per hr.) Hours Worked Per Week \_\_\_\_\_

Your Days Off: MON ☐ TUE ☐ WED ☐ THUR ☐ FRI ☐ SAT ☐ SUN ☐



A.F.L. C.I.O.

ARNALDO F. ESPINOSA  
President

**COMPLETE & RETURN THIS FORM**

BERNARD R. MAGNANT  
Secretary-Treasurer

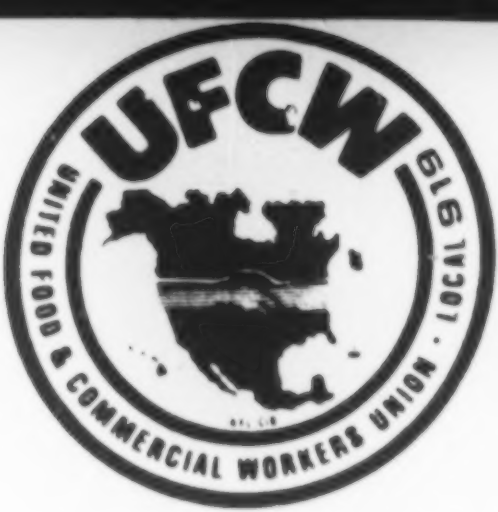
**UNITED FOOD AND COMMERCIAL WORKERS UNION**

**LOCAL 919**

U.F.C.W. - A.F.L.-C.I.O.

264 Farmington Avenue • Hartford, Connecticut 06105 • Telephone (203) 525-9333





UNITED FOOD AND COMMERCIAL WORKERS UNION  
**LOCAL 919**

U.F.C.W. - A.F.L.-C.I.O.

264 Farmington Avenue • Hartford, Connecticut 06105 • Telephone (203) 525-9333

Outside Local Dialing Area 1-800-842-2215

ARNALDO F. ESPINOSA  
President

BERNARD R. MAGNANT  
Secretary-Treasurer



**WHY  
PAY UNION  
DUES ??**

**WISE WORKERS  
SAY:**

**"We Pay Union Dues"  
BECAUSE ...**

***IT DOESN'T COST: IT PAYS  
To Belong To  
Local 919***



**NOT**

*belonging is expensive.*

Pregnancy Leave of Absence • Grievance and Arbitration • Wage Statement • Seniority • Union and Security • Psychotherapy  
• No Polygraph Tests • First Aid Kit • Employees' Lounge • Recognition & Bargaining Unit • No Reduction in Wages

**Write or Call → → →**

UNITED FOOD AND COMMERCIAL WORKERS UNION  
**LOCAL 919**

UFCW - AFL-CIO

264 Farmington Avenue • Hartford, Connecticut 06105 • Telephone (203) 525-9333  
Outside Local Dialing Area 1-800-842-2215

***Compare***

WITHOUT A UNION

WITH A UNION

???

- HIGHER WAGES
- MEDICAL EXPENSE BENEFITS
- VISION CARE BENEFITS
- CREDIT UNION SERVICES
- PAID PRESCRIPTIONS BENEFITS
- LIFE INSURANCE
- DENTAL EXPENSE BENEFITS
- WEEKLY DISABILITY PAY
- SURGICAL EXPENSE BENEFITS
- MOBILE HEALTH-CARE EXAMINATION
- PENSION PLAN
- MATERNITY EXPENSE BENEFITS
- HOSPITAL EXPENSE BENEFITS
- DIAGNOSTIC X-RAY AND LABORATORY
- SCHOLARSHIP AWARDS
- ACCIDENTAL DEATH & DISMEMBERMENT
- PHYSICIANS EXPENSE BENEFITS
- SUPPLEMENTARY ACCIDENT BENEFITS
- VACATIONS, GRIEVANCE PROCEDURES,
- PAID HOLIDAYS, PAID SICK LEAVE,

Rest Periods with Pay      Wages  
Leave of Absence      Ambulance Service  
Wearing Apparel and Tools

**Holidays**

- New Year's Day
- Washington's Birthday
- Memorial Day
- Independence Day
- Labor Day

- Thanksgiving Day
- Christmas Day
- Birthday Holiday
- Personal Holidays
- Anniversary Date of Employment

Sick Leave with Pay  
Severance Pay

Anesthesia  
No Discrimination

Safety      Work Schedules  
Death in Family

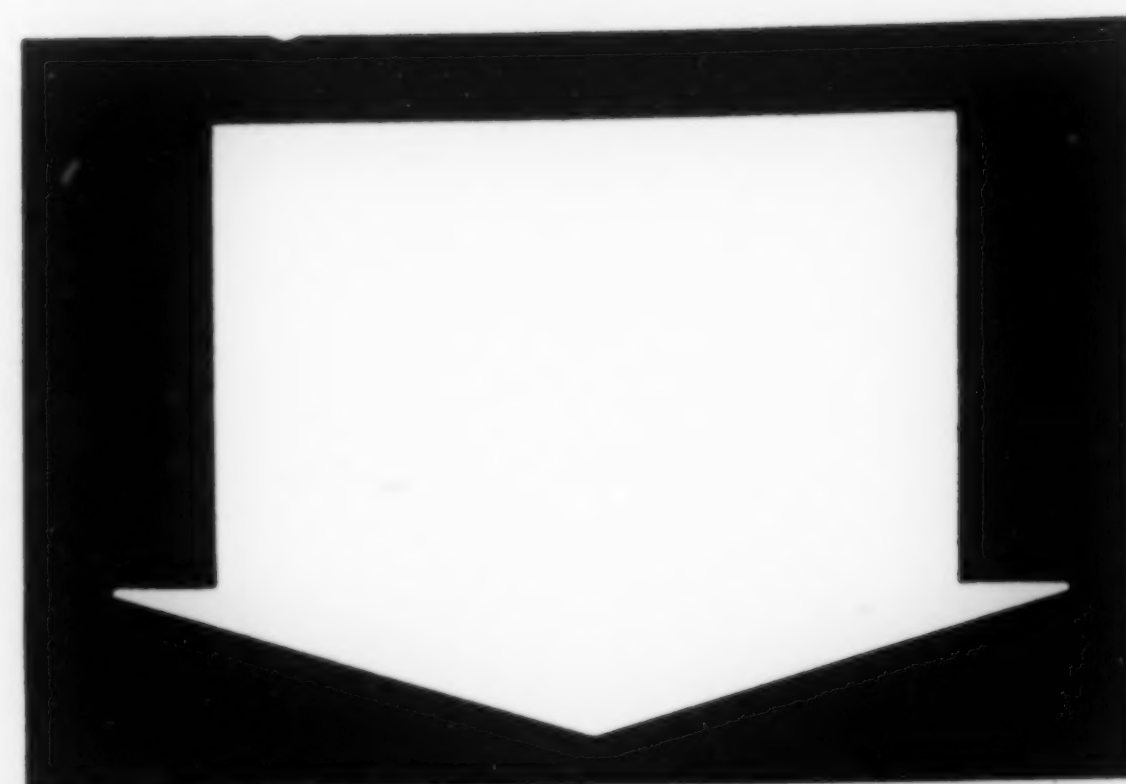
Injuries  
Jury Duty  
Inspection of  
Payroll Records  
Time Clocks  
Bulletin Boards  
Privileges  
Registers  
Military Duty  
No Individual  
Agreements  
Visiting Stores  
Hours

Vacations  
Validity





You will like working in  
a **UNIONIZED**  
**PLACE!!**



**DO IT NOW!**

HELP YOURSELF TO A  
BETTER FUTURE

Thanks

FOR YOUR HELP



**A. F. L.**

**UNITED FOOD AND COMMERCIAL WORKERS UNION**

**LOCAL 919**

264 FARMINGTON AVENUE, HARTFORD, CONNECTICUT 06105

PHONE (203) 525-9333

OUTSIDE LOCAL DIALING AREA 1-800-842-2215



**C. I. O.**

**AUTHORIZATION FOR REPRESENTATION**

Desiring to enjoy the rights and benefits of collective bargaining, I the undersigned employee of .....  
at ..... hereby authorize United Food & Commercial Workers International Union, AFL-  
CIO-CLC, or its chartered Local Union to represent me for purposes of collective bargaining, respecting rates of pay, wages, hours  
of employment, or other conditions of employment, in accordance with applicable law.

**NO INITIATION FEE – NO DUES UNTIL A CONTRACT IS SIGNED**

DATE .....

SIGNATURE OF EMPLOYEE .....

Please PRINT:

Your Social Security Number

--	--	--	--	--	--	--	--	--	--

Your Name ..... Your Address .....

City ..... State ..... Zip Code ..... Home Phone Number .....

Your Department Name ..... Your shift: DAY ☐ NIGHT ☐ Your Job Title ..... Dept. No. ....

Date Hired ..... Your Present Rate of Pay ..... (per hr.) Hours Worked Per Week .....

Your Days Off: MON. ☐ TUE. ☐ WED. ☐ THUR. ☐ FRI. ☐ SAT. ☐ SUN. ☐

C-126

**UNITED FOOD AND COMMERCIAL WORKERS UNION**

**LOCAL 919**

U.F.C.W. – A.F.L.-C.I.O.

264 Farmington Avenue • Hartford, Connecticut 06105 • Telephone (203) 525-9333

Outside Local Dialing Area 1-800-842-2215

C-126

MAY 9 1991

OFFICE OF THE CLERK

No. 90-970

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

ROBERT P. JOY  
*Counsel of Record*  
KEITH H. McCOWN  
BENJAMIN SMITH  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, MA 02108  
(617) 523-6666  
*Counsel for Petitioner,*  
*Lechmere, Inc.*



**QUESTION FOR REVIEW**

Has the National Labor Relations Board impermissibly expanded the right of union representatives to trespass on private property beyond the limits established by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).



## TABLE OF CONTENTS

QUESTION FOR REVIEW .....	i
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
1. <i>The Premises</i> .....	5
2. <i>Enforcement Of The No Access Policy</i> .....	7
3. <i>The Lechmere Employees At Newington</i> .....	8
4. <i>The Union Activity At Newington</i> .....	9
5. <i>The Excluded Evidence Concerning Other Union         Activity At Newington</i> .....	11
SUMMARY OF ARGUMENT .....	12
ARGUMENT .....	15
I. <i>The Jean Country Analysis Fails To Follow The         Applicable Law</i> .....	15
A. <i>Jean Country Erroneously Fails To Adopt The             Strict Babcock &amp; Wilcox Protection Of Prop-             erty Rights</i> .....	15

	Page
B. <i>The Jean Country Analysis Disregards The Supreme Court's Directive That The General Counsel Has A "Heavy" Burden To Justify Trespassing, And Permits Trespass Without The Necessary Showing Of Inability To Reach The Employees</i> . . . . .	23
1. <i>The Union's Lack Of Success Has Implicitly Become A Factor In Judging Whether Trespass Is Warranted</i> . . . . .	23
2. <i>The Board Accepts Presumptions, Conjecture And Unsupported Opinion As "Proof" On The Issue Of Lack Of Reasonable Alternative Means</i> . . . . .	25
3. <i>The Board Has Created An Impermissibly Low Standard For Establishing That The Use Of Alternative Communication Methods Is Not Reasonable</i> . . . . .	31
4. <i>The Babcock &amp; Wilcox Burden Of Proof Has Been Partially Shifted To Require The Employer To Show That Reasonable Alternative Communication Methods Existed</i> . .	33
II. <i>Jean Country As Applied Betrays The General Rule Protecting Property Interests</i>	34
A. <i>The Board's Case Law Trends Since Jean Country Make Infringement On Property Rights The Rule, Not The Exception</i> . . . . .	34

	Page
B. <i>In Authorizing Trespassory Access The Board And The First Circuit Failed To Account For The Effect Of The Union Abusing The Exercise Of Section 7 Rights</i> . . . . .	35
III. <i>Deference To The Board Is Not Warranted</i> .	38
A. <i>Lechmere, Inc. Is Not Distinguishable From The Decision Overturned By The Court Thirty-Five Years Ago In Babcock &amp; Wilcox</i> . . . . .	38
B. <i>The Board Has Demonstrated No Grounds To Depart From Established Supreme Court Precedent</i> . . . . .	39
C. <i>The Board's Historically Inconsistent Applications Of Babcock &amp; Wilcox Further Reduce The Level Of Deference Required</i> .	39
IV. <i>The Court Should Reaffirm Babcock &amp; Wilcox Principles And Correct The Deficiencies In The Jean Country Analysis That So Readily Cause Abrogation Of Property Rights</i> . . . . .	47
CONCLUSION . . . . .	49

## TABLE OF AUTHORITIES

Constitutional Provisions:	
United States Constitution:	
Amendment I .....	Page 17
Amendment V .....	3
Statutes:	
28 U.S.C. § 1254(1) .....	2
29 U.S.C. § 157 .....	2
29 U.S.C. § 158(a)(1) .....	2
29 U.S.C. § 160(e) .....	2
29 U.S.C. § 160(f) .....	4
29 U.S.C. §§ 160(e) .....	4
Cases:	
<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968) .....	17, 22
<i>Babcock and Wilcox Co.</i> , 109 N.L.R.B. 485, 34 L.R.R.M. (BNA) 1373 (1954) .....	16, 39, 41
<i>Belcher Towing Co.</i> , 238 N.L.R.B. 446, 99 L.R.R.M. (BNA) 1566 (1978), <i>enforcement denied in relevant part</i> , 614 F.2d 88 (5th Cir. 1980), <i>remanded</i> , 256 N.L.R.B. 666, 107 L.R.R.M. (BNA) 1300 (1981), <i>rev'd</i> 683 F.2d 418, (11th Cir. 1982) .....	33
<i>Browning's Foodland, Inc.</i> , 284 N.L.R.B. 939, 125 L.R.R.M. (BNA) 1264 (1987) .....	46
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	13, 17, 19
<i>C.E. Wylie Const. Co.</i> , 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989) .....	35
<i>Dexter Thread Mills d/b/a Lee Wards</i> , 199 N.L.R.B. 543, 81 L.R.R.M. (BNA) 1293 (1972) .....	43, 44

Page	
<i>Dolgin's, A Best Co.</i> , 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989) .....	22, 35
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	3, 21
<i>Emery Realty, Inc.</i> , 286 N.L.R.B. 372, 126 L.R.R.M. (BNA) 1241 (1987), <i>enforced</i> , 863 F.2d 1259 (6th Cir. 1988) .....	45
<i>Fairmont Hotel Co.</i> , 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986) .....	4, 23, 45
<i>Falk Corp.</i> , 192 N.L.R.B. 716, 77 L.R.R.M. (BNA) 1916 (1971) .....	42, 43
<i>General Dynamics/Telecommunications, div. of General Dynamics Corp.</i> , 137 N.L.R.B. 1725, 50 L.R.R.M. (BNA) 1475, 1476 (1962) .....	40, 41
<i>Giant Food Markets, Inc.</i> , 241 N.L.R.B. 727, 100 L.R.R.M. (BNA) 1598 (1979), <i>enforcement denied and remanded</i> , 633 F.2d 18 (6th Cir. 1980) .....	44, 45
<i>Granco, Inc.</i> , 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989) .....	35
<i>Greyhound Lines, Inc.</i> , 284 N.L.R.B. 1138, 125 L.R.R.M. (BNA) 1266 (1987) .....	46
<i>Hardee's Food Systems, Inc.</i> , 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989) .....	32, 35
<i>Homart Development Co.</i> , 286 N.L.R.B. 714, 126 L.R.R.M. (BNA) 1244 (1987) .....	45
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) ...	13, 17, 18, 19, 22
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987) .....	39
<i>Jean Country</i> , 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) .....	<i>passim</i>
<i>L &amp; L Shop Rite, Inc.</i> , 285 N.L.R.B. 1036, 126 L.R.R.M. (BNA) 1151 (1987) .....	45
<i>Lechmere, Inc.</i> , 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989) .....	<i>passim</i>
<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313 (1st Cir. 1990) .....	<i>passim</i>
<i>Little &amp; Co.</i> , 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) .....	35



	Page
<i>Lloyd Corp. v. Tanner</i> , 407 U.S. 551 (1972) .....	17
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) .....	3
<i>Mayer Group, Inc.</i> , 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989) .....	35
<i>Monogram Models, Inc.</i> , 192 N.L.R.B. 705, 77 L.R.R.M. (BNA) 1913 (1971) .....	35, 41, 42
<i>Montgomery Ward &amp; Co., Inc.</i> , 265 N.L.R.B. 60, 111 L.R.R.M. (BNA) 1345 (1982) .....	44, 45
<i>Mountain Country Food Store, Inc.</i> , 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989) .....	22, 35
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 222 F.2d 316 (5th Cir. 1955) .....	16
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) <i>passim</i>	
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 110 S.Ct. 1542 (1990) .....	38
<i>NLRB v. Fansteel Metallurgical Corp.</i> , 306 U.S. 240 (1939) .....	3
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975) .....	39
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987) .....	3
<i>Providence Hospital</i> , 285 N.L.R.B. 320, 126 L.R.R.M. (BNA) 1145 (1987) .....	45
<i>Sabine Towing &amp; Transportation Co., Inc.</i> , 205 N.L.R.B. 423, 84 L.R.R.M. (BNA) 1275 (1973), <i>enforcement denied in relevant part</i> , 599 F.2d 663 (5th Cir. 1979) ..	33
<i>Sahara Tahoe Corp.</i> , 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989) .....	35
<i>Scholle Chemical Corp.</i> , 192 N.L.R.B. 724, 78 L.R.R.M. (BNA) 1009 (1971), <i>enforced</i> 82 L.R.R.M. (BNA) 2410 (7th Cir. 1972) .....	43
<i>Schwab Foods, Inc.</i> , 284 N.L.R.B. 1055, 125 L.R.R.M. (BNA) 1225 (1987), <i>enforced</i> , 858 F.2d 1285 (7th Cir. 1988) .....	46

	Page
<i>Sears, Roebuck &amp; Co. v. San Diego County Council of Carpenters</i> , 436 U.S. 180 (1978) .....	3, 13, 18, 20, 23, 39, 46, 47
<i>Sentry Markets, Inc.</i> , 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1002 (1989), <i>enforced</i> , 914 F.2d 113 (7th Cir. 1990) .....	22, 27, 35
<i>Shopping Kart Food Market, Inc.</i> , 228 N.L.R.B. 1311, 94 L.R.R.M. (BNA) 1705 (1977) .....	48
<i>Sisters International, Inc.</i> , 285 N.L.R.B. 796, 126 L.R.R.M. (BNA) 1148 (1987) .....	45
<i>Skaggs Companies, Inc.</i> , 285 N.L.R.B. 360, 126 L.R.R.M. (BNA) 1149 (1987) .....	45
<i>Smitty's Super Markets, Inc.</i> , 284 N.L.R.B. 1188, 125 L.R.R.M. (BNA) 1268 (1987) .....	46
<i>Solo Cup Co.</i> , 172 N.L.R.B. 1110, 68 L.R.R.M. (BNA) 1385 (1968), <i>enforcement denied</i> , 422 F.2d 1149 (7th Cir. 1970) .....	41
<i>Sparks Nugget, Inc.</i> , 298 N.L.R.B. No. 69, 134 L.R.R.M. (BNA) 1121 (1990) .....	35
<i>Subbiondo and Assocs., Inc.</i> , 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA) 1006 (1989) .....	35
<i>Target Stores</i> , 300 N.L.R.B. No. 136 (1990) .....	35
<i>Target Stores</i> , 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989) .....	22
<i>Tecumseh Foodland</i> , 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989) .....	47
<i>The Red Food Stores, Inc.</i> , 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989) .....	30, 35, 46
<i>Trident Seafoods Corp.</i> , 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989) .....	35
<i>United Supermarkets, Inc.</i> , 283 N.L.R.B. 814, 125 L.R.R.M. (BNA) 1069 (1987) .....	46
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) ..	38

	Page
<i>Wegmans Food Markets, Inc.</i> , 300 N.L.R.B. No. 114 (1990) .....	35
<i>W.S. Butterfield Theatres, Inc.</i> , 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989) .....	35
<b>Rules:</b>	
Sup. Ct. R. 13.1 .....	2
Sup. Ct. R. 29.1 .....	1
<b>Miscellaneous:</b>	
NLRB Casehandling Manual § 10056.4 .....	31
Note, 104 Harv.L.Rev. 1407 (1991) .....	20

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

No. 90-970

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

On Writ Of Certiorari To  
The United States Court Of Appeals  
For the First Circuit

**BRIEF FOR THE PETITIONER**

Petitioner, Lechmere, Inc. ("Lechmere"),<sup>1</sup> respectfully petitions this Court to reverse a judgment and decree of the United States Court of Appeals for the First Circuit ("First Circuit") and deny enforcement to an order of the National Labor Relations Board ("NLRB" or the "Board").

<sup>1</sup> In compliance with Rule 29.1 of the Rules of the Supreme Court of the United States, Lechmere states the following: Lechmere, Inc. is a Massachusetts corporation wholly owned by LMR Acquisition Corp.

## OPINIONS BELOW

The First Circuit's opinion is reported at 914 F.2d 313 (1st Cir. 1990), and appears at Appendix A to Lechmere's Petition for Writ of Certiorari (hereafter "Pet." or "the Petition"). The underlying decision and order of the NLRB are reported at 295 N.L.R.B. No. 15, 131 L.R.R.M. (BNA) 1480 (1989), and appear at Appendix B to the Petition. Included in the Board's decision is the earlier opinion and order of the Administrative Law Judge in Case No. 39-CA-3571. (Pet. B-9—B-29) Finally, Lechmere filed with the First Circuit a Suggestion for Rehearing En Banc which was denied by an order of the court appearing at Appendix C to the Petition.

## JURISDICTION

Lechmere invokes the jurisdiction of this Court under Section 10(e) of the National Labor Relations Act, as amended (the "Act"). 29 U.S.C. §160(e); *see* 28 U.S.C. §1254(1). The First Circuit enforced the NLRB's order on September 17, 1990. Lechmere's December 17, 1990 Petition for Writ of Certiorari was timely. Sup. Ct. R. 13.1.

## STATUTORY PROVISIONS INVOLVED

Section 7 of the Act provides in part: "Employees shall have the right to self organization, to form, join, or assist labor organizations . . . ." 29 U.S.C. §157. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. §158(a)(1).

## STATEMENT OF THE CASE

This case presents the frequently recurring question of whether labor union organizers can trespass on private property to engage in activity otherwise protected by Section 7 of the Act. In the typical situation, union agents are ejected from private property, and the union files an unfair labor practice charge alleging that the employer has interfered with the employees' Section 7 right to organize and form unions. The Board either finds merit to the charge and orders that some form of access be allowed, or dismisses the charge and lets ordinary property rights prevail.

For at least thirty years the Board has devised various approaches to resolve the contest between "Section 7 rights"<sup>2</sup> and property rights,<sup>3</sup> all purporting to be based upon the only Supreme Court decision that has ever squarely addressed the issue, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). At issue is the Board's most recent approach.

Lechmere is a retail store chain engaged in the sale of goods other than clothing. (Joint Appendix, hereafter "J.A." 17, 114; *and see* transcript of proceedings before the Administrative Law Judge, hereafter "R." 4-5). In the summer of 1987, representatives from Local 919, United Food and Commercial

<sup>2</sup> The Union does not have a direct Section 7 right to communicate with employees. Rather, at issue is the employees' right to self-organization. Thus, "any right [that union organizers] may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively." *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

<sup>3</sup> The Court has noted that an employer's property rights, created by state law but explicitly protected in this context by the Fifth Amendment to the Constitution, must yield "only when necessary to effectuate the central purposes of the Act." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 581 (1978) (Rehnquist, J., dissenting) (quoting *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257, 265 (1939)); *see also* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (characterizing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).



Workers Union, AFL-CIO (the "Union") trespassed on private property both inside and outside Lechmere's store in Newington, Connecticut, and attempted to organize the employees. J.A. 18, 30, 35-36. Lechmere ejected the Union organizers from the store and parking lot, and thereafter consistently excluded them from private property in and around the store. J.A. 18-20. Lechmere's actions were consistent with a strict, impartially enforced no-solicitation policy. J.A. 59-66. Various groups other than the Union, including the American Automobile Association, the Salvation Army, and the Girl Scouts, had previously been excluded from soliciting on the private property at Lechmere's premises. *Id.*

The Union filed an unfair labor practice charge alleging that by enforcing its property rights, Lechmere violated Section 8(a)(1) of the Act, which prohibits interference with employees' right to self-organization. J.A. 126-27; R.3-4. After an evidentiary hearing an Administrative Law Judge ("ALJ") found merit to this charge. He evaluated the issues under *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), which was at that time the Board's latest interpretation of *Babcock & Wilcox*. Pet. B-21—B-24.

Lechmere filed exceptions and the full Board considered the case. The Board affirmed the ALJ but evaluated the case under yet another new approach to *Babcock & Wilcox* issues — *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) — which had substantially modified and partially overruled the not yet two year old *Fairmont Hotel*. Pet. B-1—B-8.

Lechmere petitioned the First Circuit for review of the Board's order, and the Board filed a cross-application for enforcement, all as permitted under Sections 10(e) and (f) of the Act. 29 U.S.C. §§160(e) and (f). The First Circuit enforced the Board's order. *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), Pet. A-1—A-23. Judge Torruella strongly dissented. *Id.* at 326, Pet. A-24—A-33.

*Fairmont Hotel* and now *Jean Country* involve a balance of

rights pitting the "strength" of private property rights against the "strength" of Section 7 rights. The outcome of this contest turns on the availability of a union's reasonable alternative means to reach employees (that is, to exercise Section 7 rights) without trespassing on a target employer's private property. To assess the appropriate accommodation, the facts must be examined in some detail.

### 1. *The Premises.*

Lechmere opened its Newington store in November of 1986. J.A. 114; R.4-5. "Lechmere Plaza" is a parcel 880 feet wide (north-south), and 740 feet deep (east-west). J.A. 17, 114; R.4-5. Lechmere Plaza is bounded on the east by the Berlin Turnpike, a fifty mile per hour four-lane divided highway running north-south; and on the north by Pascone Street. J.A. 114, 116. At this location, the Berlin Turnpike could be best described as a commercial, highway strip. Lechmere's neighbors to the south include a Grossman's home improvement store and a Mobil service station. Across the highway on the north side is a Bradlees' department store and a large commuter parking lot. J.A. 73. There are no sidewalks. J.A. 17.

The main driveway into Lechmere Plaza is from the south-bound lanes of the Berlin Turnpike, where a turning lane allows vehicles to enter without impeding the flow of traffic. J.A. 115; R.4-5. There is another driveway off Pascone Street. *Id.* Finally, there is a separate delivery driveway off the Berlin Turnpike leading to the rear of the Lechmere store. J.A. 57, 115; R.4-5.

A grassy apron approximately forty-six feet wide runs the length of Lechmere Plaza along the Berlin Turnpike, with breaks for the two driveways. J.A. 115; R.4-5. Only a four foot strip farthest from the road is private property; the rest of the forty-six foot width is public. *Id.*

There are two structures located within Lechmere Plaza, a

free-standing Lechmere store on the south side, and over 100 feet away a strip of thirteen satellite storefronts on the west side. J.A. 114, 121; R.4-5. The remainder of the parcel is a large parking lot. *Id.* Lechmere owns a roughly triangular piece of the parcel including its store location and some of the parking area. J.A. 66-67. Newington Commercial Associates Limited Partnership owns a corresponding, roughly triangular portion containing the satellite stores. J.A. 114-15; R.4-5. There is joint ownership in some of the parking areas. *Id.* Konover Management Corporation, a general partner in Newington Commercial Associates, manages the satellite stores. *Id.*

There are no benches, chairs or other such inducements for customers to linger in front of the Lechmere store. J.A. 71. Lechmere Plaza contains no restaurants, bars, ice cream shops, convenience stores, or any other establishments that might draw a more generalized or "impulse" clientele. J.A. 15-16, 71-72. The satellite stores are specialized, including a card shop and a Radio Shack. J.A. 72. In the summer of 1987, only four of the satellite stores were open for business, including the card shop, but excluding Radio Shack. J.A. 72. As mentioned, there is no sidewalk on the Berlin Turnpike, and a fence separates Lechmere Plaza from its nearest neighbor to the south, a home improvement store. J.A. 17.

Two public telephones are located in front of the satellite stores. J.A. 114; R.4-5. However, they are at least 500 feet away from the Berlin Turnpike, across the entire Lechmere Plaza parking area. J.A. 72-73, 121; R.4-5. These telephones are not visible from the Berlin Turnpike until drivers are directly in front of Lechmere Plaza, because the traffic is travelling uphill. *Id.* There was no evidence in the record that any members of the general public or any passers-by ever made use of the pay phones in front of the satellite stores. *See* J.A. 49-51, 71-73. Pay phones are more accessible at several nearby locations. J.A. 73. For the convenience of its own customers Lechmere has pay telephones within its store. J.A. 97.

The above-listed circumstances existing in Lechmere Plaza, particularly in the summer of 1987, induced minimal interchange of customers between Lechmere and the satellite stores. J.A. 71. Further, these circumstances establish an inducement to the public to enter Lechmere Plaza for the specific purpose of shopping at one of the stores, and little else. *See* J.A. 73.

## 2. *Enforcement Of The No Access Policy.*

In 1982, Lechmere promulgated a no solicitation/no distribution policy for all its stores that has not meaningfully changed since. J.A. 87-91, 116; R.4-5. In pertinent part, that policy states:

Non-associates [non-employees] are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use.

J.A. 123-25; R.4-5.

The policy is a serious matter to Lechmere. All Lechmere employees are informed during orientation about the no solicitation/no distribution policy. J.A. 68. The policy is contained in an introductory booklet distributed to all new employees, and each employee signs an acknowledgement form indicating receipt of the booklet, and accepting the obligation to learn its contents. J.A. 68-70. Doorways to the Newington store are posted with this sign: "TO THE PUBLIC: No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises." J.A. 115-16; R.4-5.

The policy has been consistently and unfailingly enforced at

the Newington store since it opened in November of 1986. Especially when the store was new, the General Manager rejected numerous telephone requests for permission to solicit on the premises (raffles, bake sales, etc.). J.A. 65-66. More specifically, in the fall of 1986 the General Manager immediately protested to the American Automobile Association after they entered the parking lot without permission and left leaflets on cars; he also caused those leaflets to be removed from windshields. Later, the General Manager denied the Salvation Army's request to station a "bell ringer" at the store for the 1986 Holiday season. In early March of 1987, he protested to a local Burger King restaurant about leaflets left on cars during the previous weekend. Finally, in the spring of 1987 he personally asked Girl Scouts to abandon their attempt to sell cookies in front of the store. J.A. 59-64.

This consistent enforcement was later applied to the Union's solicitations, as described *infra*.

### 3. *The Lechmere Employees At Newington.*

In the summer of 1987 there were 201 employees at the Newington store, of which 179 lived in Newington or two contiguous cities, Hartford and New Britain. J.A. 76-77.

The store was open to customers that summer from 10:00 a.m. to 9:30 p.m., Monday through Saturday. J.A. 73. Employees generally arrived for work about one-half hour early, at 9:30 a.m., and they departed within one-half hour after closing, by 10:30 p.m. J.A. 22-23, 73-74. The parking lot lights automatically shut off at 10:30 p.m. each night. J.A. 74.

Employees are asked to park their cars on the eastern side of the parking lot, close to both the Berlin Turnpike and the main driveway into Lechmere Plaza. J.A. 15, 121; R.4-5. Before work hours employees enter the store through the "customer pick-up" entrance, on the east side of the building, rather than through the main entrance on the north side. J.A. 57-59,

121; R.4-5. There are no signs or barriers denoting an employee parking area or an employee entrance to the store. J.A. 16, 58. Customers will park in the same area, especially those picking up large purchases at the east entrance to the store, which is designated for that purpose. J.A. 57-59.

### 4. *The Union Activity At Newington.*

In the summer of 1987, the Union made a variety of attempts to organize the Lechmere employees at Newington. The very first effort was a full page advertisement in the June 16 Hartford Courant, marked by a large headline ("Attention Lechmere Employees"), and containing a clip-out union authorization card. J.A. 116, 119; R.4-5. The Hartford Courant is the largest daily paper in the Hartford area, and its circulation area includes Hartford, Newington and New Britain. J.A. 43.

The next efforts by the Union were a series of trespassory solicitations at the Newington store on June 18. Union organizers placed leaflets on cars parked in the informal employee parking area three different times on June 18, at approximately 10:00 a.m., 5:00 p.m., and at one other time. J.A. 18-20, 22-23. Organizers also entered the store itself. J.A. 18, 30-34, 80-81.

On June 18, whenever Lechmere management discovered the Union organizers in the store or the parking lot distributing literature, they informed the organizers about the no solicitation/no distribution policy and asked them to leave the property, including the parking lot. J.A. 18-20. As with previous violations of the policy (leafletting performed by nearby businesses or other groups, *see* J.A. 59-60), Lechmere management also removed the Union's leaflets left on windshields. J.A. 18-20. This pattern continued on several other days in June and July of 1987. Union organizers repeatedly entered the parking lot and the store to distribute literature, and they



were instructed to leave Lechmere property upon being discovered. J.A. 20-22, 33-34, 35-36. The Union representatives complied with Lechmere's requests, but not immediately. J.A. 21.

At times the parking lot distribution was concentrated in the area informally designated for employee parking. J.A. 18-19. On other days the Union left leaflets across the entire parking lot, beyond Lechmere's property. J.A. 74-75. Customers complained to Lechmere about leaflets left on their cars. J.A. 71, 96. The Union knew where the employees generally parked, and that many employees arrived before the store opened at 10:00 a.m. J.A. 23.

Shortly after the leafletting began, Lechmere inquired about Konover Management Corporation's position concerning such activity in the parking lot. By letter dated June 26, 1987, which was a confirmation of a June 22 telephone call, Konover authorized Lechmere to "prevent the distribution of hand bills, flyers, etc. within the shopping center." J.A. 67-68, 86-87, 140.

During this period the Union placed in the Hartford Courant four more large advertisements aimed at organizing Lechmere employees, and one in the New Britain Herald. J.A. 116; R.4-5. All but one of the advertisements appeared by July 9, 1987. *Id.* Through the end of July, the Union also tried more direct methods to reach employees away from work. J.A. 42.

In Connecticut one can obtain the name and address of the registered owner of an automobile by presenting a license plate number at the Division of Motor Vehicles. J.A. 37, 77-78. At least one employee provided the Union with further information about names and addresses of co-workers. J.A. 42. Using these methods, the Union allegedly obtained names and addresses of forty-one Lechmere employees. Through the use of a computerized mailing list, those employees were sent several mailings at their homes. *Id.* The Union also attempted home visits and telephone calls. J.A. 38-39, 46-47.

The Union was not receiving a strong response from this process and stopped most of these efforts by late July, 1987. J.A. 42. Despite the Union's overall lack of organizing success, there is no doubt that Lechmere employees were aware of the Union's attempts to reach them. Roughly two dozen employees complained to management about the newspaper advertisements. J.A. 78. About two dozen employees complained about receiving Union literature at home. *Id.* About one dozen employees complained about being visited at home by the Union. *Id.* On July 1, only two weeks after the organizing activity began, Lechmere sent a letter to employees openly discussing the Union's handbilling, the newspaper ads, and home contacts. J.A. 91-92, 137-39; R.243-44.

Beginning on August 7, 1987 the Union activity at Newington took a new turn. Union representatives picketed that day and for the remainder of the month at the forty-six foot wide grass strip along the Berlin Turnpike. J.A. 116-17; R.4-5. No longer aiming its efforts exclusively at Lechmere employees, the Union's signs explained to the public that Lechmere was a non-union store. J.A. 43-44. This picketing continued intermittently, but at least several times per month until March of 1988. J.A. 116-17; R.4-5. In addition, the Union placed five more large advertisements in the Hartford Courant expressing its new appeal to the general public. J.A. 116; R.4-5.

During this extended period of picketing, Lechmere never asked or ordered the Union representatives to leave the area along the Berlin Turnpike. J.A. 117; R.4-5. The informal employee parking area was just a few yards away from that location. J.A. 121; R.4-5.

##### 5. *The Excluded Evidence Concerning Other Union Activity At Newington.*

The record contains evidence that the Union representatives both attempted and actually engaged in far more than hand-

billing in the informal employee parking area. They entered the store on some days. J.A. 18, 30-32, 35-36. On other occasions they left leaflets on cars across the entire parking lot. J.A. 74-75.

The ALJ excluded evidence about other disruptive Union activity, despite Lechmere's detailed offers of proof concerning these incidents. Lechmere was prepared to prove that from the very first day of on-site organizing activity (June 18, 1987), Union representatives repeatedly entered the store, and among other things, confronted employees, distributed literature, stuffed literature into merchandise, entered warehouse areas not open to the public, left literature in public restrooms, and caused disturbances by refusing to leave when asked. *See* J.A. 30-34, 54, 55, 79-81, 84-85.

The ALJ also excluded evidence concerning the ease and speed with which the names and addresses of automobile owners can be obtained from the Division of Motor Vehicles in Connecticut. J.A. 77-78.

Finally, the ALJ excluded evidence concerning employee complaints to management about contacts by the Union. J.A. 77-79.

The importance of this excluded evidence will be discussed in Argument, *infra*. Lechmere contends that the Judge's rulings were erroneous and prejudicial, and that the Board and the First Circuit compounded the prejudice in their affirmation.

### SUMMARY OF ARGUMENT

Over thirty years ago a unanimous Supreme Court ruled that union organizers could not trespass on an employer's property to contact the workforce unless the employees were inaccessible and "beyond the reach" of less intrusive, non-trespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and

telephone calls. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 107 n.1, 111-14 (1956). The Supreme Court has since offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where the "usual channels" of communication do not enable a union to "reach" the target workforce. *See id.* at 112. Though not squarely on point, the intervening cases bolster rather than diminish the original *Babcock & Wilcox* holding. *See Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972). *Dicta* from *Sears* sums up the Court's view: it is the "general rule" that an employer may bar non-employee union organizers from his property, authorized trespass has been rare, and to gain access the union must satisfy a "heavy" burden of showing that "no other reasonable means of communicating its organizational message to employees exists." *Sears*, 436 U.S. at 205.

*Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988) is the latest of many attempts by the Board to expand *Babcock & Wilcox*. After *Jean Country*, the Board analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the property right, generally equating to the purpose for which the property is used; and (2) the "strength" of the Section 7 rights exercised by the union, with organizational rights among the strongest; and (3) the availability of reasonable alternative means for the union to communicate its intent.

The *Jean Country* analysis fails to follow the applicable law. Rather than generally deferring to property rights, as *Babcock & Wilcox* commanded, *Jean Country* substitutes a completely relative contest between rights of seemingly equal standing. Secondly, the *Jean Country* analysis routinely results in a finding of "weakened" property rights simply because the prop-

erty owner invites the public onto the premises. Coinciding with this development is the Board's conclusion that available communication methods of "diluted" effectiveness will be enough to justify trespassing. The net result is that a Section 7 right is now more likely than not to prevail over the property rights of an employer patronized by the general public, a trend not rooted in *Babcock & Wilcox*.

The *Jean Country* analysis also plays havoc with the Supreme Court's directive that General Counsel bears a "heavy" burden in this type of case. First, the union's lack of success in organizing has implicitly become a factor in judging whether trespass is warranted. Second, the Board accepts conjecture, presumptions, partial facts, and unsupported conclusions to demonstrate the supposed lack of reasonable alternative means to reach employees. Third, the Board finds "unreasonable" certain methods of communication because they are "flawed" and not a "comprehensive" source of employee identities. This substantially lowers the *Babcock & Wilcox* burden of showing that there are no alternative means merely to reach employees. Finally, in some respects the Board even shifts the burden to the employer to prove the existence of alternatives to trespass.

*Jean Country's* impermissible departure from *Babcock & Wilcox* is fully demonstrated in its application. Board case law shows that infringement on property rights has become the rule, not the exception. The Board in *Lechmere, Inc.* even authorized trespass despite a strong showing that the Union was seriously abusing the Section 7 rights it sought to assert by repeated, disruptive conduct in and around Lechmere's store.

There is no reason for judicial deference to the *Jean Country* analysis and its application in *Lechmere, Inc.* The Board

has attempted to resurrect the discredited analysis and result that mirror the very circumstances leading to the Supreme Court's *Babcock & Wilcox* decision. The Board has announced no changing patterns of workplace life influencing the *Jean Country* approach, and if anything it is easier at present to reach employees than in 1956. Less deference is also warranted to an inconsistent agency view. The *Jean Country* analysis, including its application in *Lechmere, Inc.*, caps a long history of inexplicable inconsistency in the Board's treatment of *Babcock & Wilcox*.

The Court should reaffirm *Babcock & Wilcox* principles, making authorized trespass under Section 7 a rare exception to the general rule that property rights prevail. The General Counsel's burden to justify an authorized trespass should be made truly heavy. *Babcock & Wilcox* protected the right of employees to become aware of the existence and potential benefits of unionization. *Jean Country*, at the expense of property rights, protects and expands the ability of unions to get closer to a workforce that may simply be unreceptive to the union's appeal. As the *Babcock & Wilcox* Court stated, the difference between employees' rights and union organizers' rights is "one of substance." *Babcock & Wilcox*, 351 U.S. at 113.

## ARGUMENT

- I. THE *Jean Country* ANALYSIS FAILS TO FOLLOW THE APPLICABLE LAW.
  - A. *Jean Country* Erroneously Fails To Adopt The Strict *Babcock & Wilcox* Protection Of Property Rights.

In 1956 the Supreme Court fashioned a rule to determine when non-employee union organizers could trespass on private property to engage in protected concerted activities. See



*NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (a unanimous decision by eight Justices). The Court expressly prohibited trespassing by union organizers except in situations where the target employees were inaccessible and "beyond the reach" of less intrusive, non-trespassory methods of communication, such as the mail, advertised meetings, contacts on the streets and at home, and telephone calls. *Id.* at 107 n.1, 111-14.

The *Babcock & Wilcox* Court was reviewing a 1954 NLRB decision involving union organizers' attempts to organize a factory workforce outside a small town. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485, 34 L.R.R.M. (BNA) 1373 (1954). The factory was adjacent to a highway and surrounded by private property, so the union eventually sent its agents into the parking lot to meet employees face-to-face. *Babcock & Wilcox* did not permit this trespass and the union filed an unfair labor practice charge.

In its 1954 decision, the Board ruled that it was "impossible or unreasonably difficult" for the union to reach the *Babcock & Wilcox* workforce at these particular premises by methods less intrusive than trespassing. To remove an "unreasonable impediment" to self-organization, the Board ordered that the union must have access to the factory parking lot and nearby walkways which were on private property. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94, 34 L.R.R.M. (BNA) at 1374. The Court of Appeals denied enforcement of the Board's Order. *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955).

The Supreme Court also rejected the Board's Order. *Babcock & Wilcox*, 351 U.S. at 112. The Court ruled that even reasonable, limited trespassing could not be mandated by the Board "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message," and if the employer "did not discriminate against the union by allowing other distri-

bution." *Id.* The Court concluded that an employer "must allow the union to approach his employees on his property" when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 113.

The Supreme Court has offered little basis to depart from the *Babcock & Wilcox* principle that trespassing will not be condoned except where truly necessary — where the "usual channels" of communication do not enable a union to "reach" the target workforce. *See id.* at 112. The Supreme Court cases since *Babcock & Wilcox*, though not squarely on point, have tended to bolster rather than diminish the vitality of the original *Babcock & Wilcox* holding.

In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court held that *Babcock & Wilcox* principles would determine whether a hardware store could lawfully eject non-employee union organizers from its parking lot, rather than the broad First Amendment principles discussed in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In *Logan Valley Plaza*, the Court had expanded the very limited principle that First Amendment criteria protected religious solicitation in a "company town," to apply First Amendment rights to peaceful picketing at a privately owned shopping mall. In *Central Hardware*, both the Board and the Court of Appeals applied only *Logan Valley Plaza* to find that union organizers could trespass on a retail store's parking lot. The Supreme Court vacated and instructed that on remand *Babcock & Wilcox* principles should govern. The Court gave no indication of how *Babcock & Wilcox* would apply to the facts.

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court's opinion was largely devoted to clarifying its prior opinion in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and overruling *Logan Valley Plaza*. Again, there had been considerable reliance upon *Logan Valley Plaza* in the proceedings below,

and the Court vacated and remanded. The Court, however, did affirm the accommodation principles of *Babcock & Wilcox*. *Hudgens* involved economic strike activity by Butler Shoe Company employees on a third party's private property, a shopping mall housing a Butler Shoe retail store. This setting was significantly different from *Babcock & Wilcox*. The Court stated that these facts "may or may not be relevant [to the Board] in striking the proper balance" between property rights and Section 7 rights. *Hudgens*, 424 U.S. at 522-23.

Finally, in *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978), the Court upheld a ruling by the California Supreme Court that the Act did not preempt a state court injunction against a union's trespassory "area standards" picketing. To resolve the preemption issue, the Court examined whether the picketing on private property was arguably prohibited under Section 8 or arguably protected under Section 7 of the Act. The Court analyzed the case under *Babcock & Wilcox* in deciding that the picketing was not arguably protected, stating in *dicta*:

[W]hile there are unquestionably examples of trespassory union activity [that might be protected under Section 7], experience under the Act teaches that such situations *are rare and that a trespass is far more likely to be unprotected than protected*.

Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While *Babcock* indicates that *an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule*. To gain access, the union has the burden of showing that *no other reasonable means of communicating its organizational message to employees exists or that the employer's access rules discriminate against the union solicitation. The burden . . . is a heavy one . . . [and the balance] has rarely been in favor of trespassory organizational activity*.

*Sears*, 436 U.S. at 205 (emphasis added).

Thus, the Court has remained true to the *Babcock & Wilcox* accommodation that allows trespassing only when the target workforce is inaccessible and cannot be reached by the usual channels of non-trespassory communication. In *Central Hardware* and *Hudgens* the Court repeated the *Babcock & Wilcox* generality that neither property rights nor Section 7 rights are absolute, and that the Board has primary responsibility for accommodating the two. *Central Hardware*, 407 U.S. at 544-45; *Hudgens*, 424 U.S. at 522; see *Babcock & Wilcox*, 351 U.S. at 112. The Supreme Court has never hinted, however, that the *Babcock & Wilcox* accommodation formula was too restrictive of Section 7 rights and ought to be changed. On the contrary, the *dicta* in *Sears* that legitimate trespassory organizational activity will be "rare" is the most natural application of *Babcock & Wilcox*.

Nonetheless, the Board has periodically attempted to expand *Babcock & Wilcox*. See *Lechmere, Inc.*, 914 F.2d at 329-30 (Torruella, J., dissenting), Pet. A-31—A-32; see also Section III(C), *infra*. The latest attempt is *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988). As its basis in law for this new *Jean Country* accommodation, the Board relied chiefly upon the following language from *Hudgens* to justify an attempt effectively to circumvent *Babcock & Wilcox*: "The locus of that accommodation [between property rights and Section 7 rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective §7 rights and private property rights asserted in any given context." See *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 4-5, 129 L.R.R.M. (BNA) at 1203 (citing *Hudgens*, 424 U.S. at 522).

After *Jean Country*, the Board now analyzes three shifting and unpredictable sets of facts to determine whether an employer can lawfully eject trespassing union agents: (1) the "strength" of the employer's property right; (2) the "strength"

of the Section 7 rights exercised by the union<sup>4</sup>; and (3) the availability of reasonable alternative means for the union to achieve its intent. See *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9-10, 129 L.R.R.M. (BNA) at 1205.

The thrust of *Babcock & Wilcox* unmistakably was to leave intact the usual private property rights, except where unusual circumstances required trespassing. The *Babcock & Wilcox* Court noted that the Act did not endow the NLRB with authority to "impose a servitude on the employer's property." See *Babcock & Wilcox*, 351 U.S. at 108. *Jean Country* fails to give the deference to property rights mandated by the Supreme Court, and substitutes instead a completely relative contest between rights of seemingly equal standing. See *Lechmere, Inc.*, 914 F.2d at 321, Pet. A-14 (describing the NLRB's latest attempt at accommodation as "[gathering] three interdependent bundles of facts . . . [tying] them together, and [weighing] them in the aggregate").

When the *Babcock & Wilcox* Court ordered the Board to accommodate these two rights, it did not mean that each right should be given equal weight. The only fair reading of *Babcock & Wilcox* is that the balance must be skewed in favor of private property rights.<sup>5</sup> There can be no doubt after *Sears* that was the intent. *Sears*, 436 U.S. at 205. By ignoring and even reversing that balance, the Board effectively imposes an easement in favor of union solicitation upon innumerable unsuspecting property owners, even those who, like *Lechmere*, have uniformly forbidden all solicitation. In this way, *Jean Country* and its progeny commit the same error found in the

<sup>4</sup> Organizational activity, for example, is considered a strong right, while area standards handbilling is considered to be among the weaker Section 7 rights.

<sup>5</sup> Some commentators agree that *Babcock & Wilcox* did not create a completely relative "balancing test"; but rather, that the Court itself has balanced the competing rights permanently in favor of the property owner, allowing access for Section 7 activity only when the union can meet a strict threshold of necessity to trespass. See Note, 104 HARV. L. REV. 1407, 1411 (1991).

cases underlying *Babcock & Wilcox* — failure to make a "distinction between the rules of law applicable to employees and those applicable to non-employees." *Babcock & Wilcox*, 351 U.S. at 113.

*Jean Country* impermissibly compromises property rights in more subtle ways through certain of the factors selected to analyze the relative strength of the competing interests.

First, to assess the "strength" of a property right, the Board will consider "restrictions, if any, that are imposed on public access to the property." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. The import is clear in context — employers with premises open to the public have diminished private property rights. Thus, while nominally pronouncing that *Lechmere* has "relatively substantial" property rights at Newington, the Board also noted that "the parking lots are essentially open to the public." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 4, 7, 131 L.R.R.M. (BNA) at 1481, Pet. B-4. *Babcock & Wilcox* identified the property right in question to be "the right to exclude from property." 351 U.S. at 112; see *supra* note 3. Employers exercise this right by forbidding unwanted solicitation or other unwanted guests. The Board has chosen to diminish the right to *exclude* merely because an employer exercises its coexisting and equally secure right to *invite* patrons for the purpose of transacting business. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting). *Babcock & Wilcox* did not contemplate this mutual exclusivity.

Second, after *Jean Country*, to assess the availability of reasonable alternative means, the Board will consider "most significantly, the extent to which exclusive use of the non-trespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205.

But for semantic differences this is an echo of an important part of the Board's approach struck down thirty-five years ago



in *Babcock & Wilcox*. *Babcock & Wilcox* did not allow "diluted effectiveness" of alternative means of communication to justify trespassory Section 7 activity. The *Babcock & Wilcox* Court expressly rejected the Board's view, even though it was "reasonable" (351 U.S. at 112), that "the place of work [is] so much more effective a place for communication of information that . . . the employer [is] guilty of an unfair labor practice for refusing limited access to company property to union organizers." *Babcock & Wilcox*, 351 U.S. at 107-08. By returning to an analysis that inquires whether alternative methods of communication are "diluted" in their "effectiveness," the Board has revived a viewpoint that the *Babcock & Wilcox* Court disavowed.

The combination of these two *Jean Country* factors—that employers whose property is open to the general public have suffered a self-inflicted wound to their property rights, and that alternate means of communication may not be reasonable if their effectiveness is diluted—adds to the erosion of the property rights that *Babcock & Wilcox* attempted to protect. A Section 7 right is now more likely than not to prevail over the property rights of an employer patronized by the general public. See *infra* Argument II. A.

Board cases decided since *Jean Country* are illustrative. Barring unusual circumstances, the Board routinely decides that Section 7 rights exercised by non-employees will prevail over property rights where the property is "essentially open to the public," or not a "private, non-retail setting."<sup>6</sup> This trend has strong overtones of a revival of the discredited First Amendment analysis from *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), overruled by *Hudgens v. NLRB*, 424 U.S. 507 (1976).

<sup>6</sup> See *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), enforced, 914 F.2d 113 (7th Cir. 1990); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Mountain Country Food Store, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989).

B. *The Jean Country Analysis Disregards The Supreme Court's Directive That The General Counsel Has A "Heavy" Burden To Justify Trespassing, And Permits Trespass Without The Necessary Showing Of Inability To Reach The Employees.*

*Babcock & Wilcox* requires the General Counsel to show that union organizers are unable to reach employees before a trespass will be protected. That burden is a "heavy" one. *Sears*, 436 U.S. at 205. Through a combination of factors the *Jean Country* analysis has virtually eliminated this heavy burden, and trespass can now quite readily be authorized even when the target workforce can be — or actually has been — reached by the union.

1. *The Union's Lack Of Success Has Implicitly Become A Factor In Judging Whether Trespass Is Warranted.*

*Babcock & Wilcox* instructed the Board to determine only whether union organizers can "reach" employees without trespassing. After *Jean Country* the Board considers "the extent to which exclusive use of non-trespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205 (emphasis added). The distinction is crucial. The *Babcock & Wilcox* Court was not concerned with "how" the message was received, only "whether" it could have been received. An analysis of whether the "effectiveness" of a message is "diluted" subtly allows property rights to be compromised because the employees do not react to the message.

The ALJ in *Lechmere, Inc.* recognized this distinction. He decided the case under *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986), and was not required to evaluate the reasonableness of the available alternative means

to communicate with Lechmere's workforce. The ALJ nonetheless concluded in *dicta* that there *were* adequate alternative means by which the Union could reach Lechmere employees. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 10 (ALJ opinion), Pet. B-24. ALJ Biblowitz correctly noted that "[t]he fact that a large majority of the employees rejected [the Union's] solicitations does not detract from [the fact that reasonable alternative means were available]; *Fairmont* does not require that the Union be successful in its contacts with employees, only that there are reasonable alternative means of communicating with them." *Id.* at 9-10, Pet. B-24.

The Board then decided *Lechmere, Inc.* under *Jean Country*, which had been decided in the interim. The Board ignored the ALJ's conclusion that there were reasonable alternative means, relying on facts in the record such as the Union's inability to compile a reasonably complete list of employees, and the failure of employees to return authorization cards. *Id.* at 5, Pet. B-5. The Board implicitly rejected the ALJ's definition of effectiveness, and made the Union's success an indicator of whether the available non-trespassory means of communication were adequate and effective.

This erroneous approach was largely adopted by the First Circuit. The "badges of [in]effectiveness" cited by the First Circuit included "the union's inability to identify the vast majority of workers despite due diligence, the absence of meaningful opportunities for face-to-face contact, and the union's failed efforts to reach the employees." *Lechmere, Inc.*, 914 F.2d at 323, Pet. A-18—A-19.

Considering the evidence that the Union directly "reached" twenty percent of the workforce, and was undoubtedly visible and known to a much larger percentage, these "badges" reflect lack of employee response, not inability to "reach" employees. The facts showed that there were at least six methods or "means" by which the Union was able to "reach" Lechmere employees: (1) in person, through conversation over the short

distance from public property to the area in which employees parked; (2) with signs, handbills, or posters, from the same location; (3) in person at home, by the simple process of tracing license plate registrations; (4) by mail, through the same source; (5) by telephone, again through this source; and (6) through the large newspaper advertisements voluntarily placed by the Union.

In denying that these collectively were reasonable alternatives to trespass, the Board has lost sight even of its own rule. The Board in *Jean Country* was supposed to look to whether there were reasonably effective "means" of communication, and not whether the communication visited upon employees was effective. *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 9, 129 L.R.R.M. (BNA) at 1205. When determining whether the means employed were effective, one may properly ask: "Could the employees hear what the union was saying?" or "Could they see their signs or leaflets?" One may not ask: "Did they seem to like what the union had to say?" or "How did they respond?"

## 2. *The Board Accepts Presumptions, Conjecture And Unsupported Opinion As "Proof" On The Issue Of Lack Of Reasonable Alternative Means.*

Under *Babcock & Wilcox* the General Counsel carries the burden of proving that without trespassing on an employer's property, a union will have *no reasonable alternative means* of communicating with its intended audience. 351 U.S. at 113-14. *Jean Country* nominally follows this delegation of the burden of proof. 291 N.L.R.B. No. 4, slip op. at 7, 129 L.R.R.M. (BNA) at 1205. As the present case demonstrates, however, the Board has become extremely lax about the "proof" required to meet this dispositive burden.

First, the Board will accept the weakest of facts and inferences to conclude that alternative communication methods

are unable to reach the employees. On the relative effectiveness of handbilling and displaying signs on the public property near the Lechmere store, the Board almost presumptively concluded that this was an "ineffective and unsafe locale for union activity." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-6. Factual support for the "ineffective" aspect of the Board's finding is absent. See *id.* The First Circuit elaborated somewhat, concluding that Lechmere's workforce "reports to work at a place where it is difficult to discern the targeted audience from the multitude of shoppers and persons working for other businesses within the Plaza." *Lechmere, Inc. v. NLRB*, 914 F.2d at 322-23, Pet. A-17—A-18.

By presuming the ineffectiveness of the means employed, the Board and the First Circuit virtually ignored important, undisputed facts bearing on the effectiveness of "reaching" Lechmere's workforce from public property. Each morning employees park near the forty-two foot wide public strip, well before the store opens; they depart from the same area at days' end, within one-half hour after closing. J.A. 15, 23, 74, 121; R.4-5. Every day that Union representatives stood on public property, therefore, they were within speaking distance of readily identifiable employees arriving for the day shift and leaving after the evening shift. Even if employees would not approach when beckoned they were clearly able to see the Union's message on signs. Thus, the facts show that the Union could communicate easily with readily identifiable employees leaving and returning to their cars, before and after work.<sup>7</sup> This was far better access to employees than the Supreme Court expressly found reasonable in *Babcock & Wilcox*.

<sup>7</sup> ALJ Biblowitz concluded: "Employees were easily recognized here; they parked in specified areas and arrived at predictable times." Pet. B-24. Union organizer Lisa Meucci testified that she knew where "the employee parking area" was, and that she and fellow organizers "arriv[ed] at the store between 9:15 and 9:30, making sure that the people who parked their cars were employees. The store opened up at ten o'clock, so most people that arrived at the store between 9:30 and 10:00 were employees." J.A. 23.

Factual support for the "unsafe" aspect of the Board's finding consisted of reference to the speed of passing traffic; an inference that "traffic is more than minimal" because "the area is commercial in character"; the lack of a traffic signal or stop sign; and a policeman's caution that the Union representatives should be careful near the street. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-6. The First Circuit followed suit on this point. *Lechmere, Inc. v. NLRB*, 914 F.2d at 323 n.11, Pet. A-18.

This conclusion did not spring from the facts in the record. The safety issue so heavily emphasized by the Board was not even raised or argued to the Administrative Law Judge. Safety was not a factor mentioned by the Judge in determining that the Union had means to communicate with employees without trespassing. See Pet. B-24. There was no evidence that any unsafe condition ever existed. The Union representatives were present for months, using the public property to picket and handbill, and there was no incident that provoked any testimony or evidence about a safety problem. Compare *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, slip op. at 5-6, 132 L.R.R.M. (BNA) at 1002-03 (1989) (evidence that handbilling on public property caused potential rear-end collisions, obstructed drivers' views, and backed up traffic). The second-hand testimony by Union representatives that, on June 20, 1987, a police officer told them to stay on public property but to be careful about their own safety, does not show that this area was unsafe. No doubt this is good advice whenever people stand near the street, but the only inference to be drawn is that even the police officer did not feel that the locale was unsafe, *per se*.

On the relative effectiveness of tracing license plate numbers to identify employees, the Board found that "[e]mployees *may* use cars that are not registered in their names, *may* car pool together, *may* use alternative means of transportation, or *may* park elsewhere. In addition, part-time



employees *might* not use the parking lot at those times shortly before and after the store's designated opening [sic] hours." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5—B-6 (emphasis added). Despite these "obstacles" the Union obtained forty-one employee names and addresses, which the First Circuit described as a "good faith effort" and both the Board and the First Circuit implied was "diligent." *Lechmere, Inc. v. NLRB*, 914 F.2d at 323, Pet. A-18; *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5, 131 L.R.R.M. (BNA) at 1482, Pet. B-5.

The "proof" of ineffectiveness as to this alternative method of communication thus amounts to a string of unsupported conjectures. It is even more tenuous to conclude on this record that the Union made a "diligent" or "good faith effort" to reach employees. The ALJ excluded evidence about the ease and speed with which one can obtain names and addresses using license plates. J.A. 77-78. The absence of this evidence makes it difficult to judge whether the Union's effort was truly diligent. In a similar vein, there was also no evidence about the Union's success *rate* in obtaining the forty-one names and addresses that it claimed to have, or the number of trips to the Motor Vehicle Department that were actually made. J.A. 27. For all that the record shows, the Union may have had a great success rate in tracing the employees via license plate numbers, and simply met a cold response when employees were actually contacted. There was indeed some evidence that employees complained to management about receiving mail, telephone calls, and visits from the Union. J.A. 77-78. The ALJ excluded further evidence that would tend to show that the Union was able to reach employees, but the employees were unreceptive. *Id.*

Finally, on the relative effectiveness of the Union's newspaper advertisements, the Board again resorted to conjecture: "Many of the Respondent's employees *may* never

receive, purchase, or read these local newspapers, or *may* be exposed to them only occasionally." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5 (emphasis supplied). The First Circuit found that "there is no particular reason to believe that many of the affected employees actually saw the ads," and simply repeated that "the Board judged such advertising to be inutile." *Lechmere, Inc. v. NLRB*, 914 F.2d at 316, 323, Pet. A-5, A-18.

The effectiveness of glaring, full-page advertisements aimed at the employees of a single employer — particularly employees of a retail store chain, where awareness of advertising will be high — is underestimated by the Board. See J.A. 119; R.4-5. Considering the overall relativity of the *Jean Country* analysis and its numerous factors, it seems particularly arbitrary that the Board should summarily dismiss the mass media as an unreasonable alternative means of communication in nearly every case. See *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. A large advertisement, which may provoke private telephone calls or even the submission of a clip-out authorization card, is not necessarily any less effective than direct contact at the place of employment, and perhaps may be even *more* effective. As Judge Torruella stated: "[U]nder the guise of fact-finding and 'expertise,' [the Board] in one clean swoop not only wipes out [the *Babcock & Wilcox* directive that the availability of the 'usual' methods of publicity must be assessed in this accommodation] but [also] declares inexistent and impotent 'the usual methods of imparting information' used by the entire advertising and publicity industry." *Lechmere, Inc. v. NLRB*, 914 F.2d at 328, Pet. A-28 (Torruella, J., dissenting).

In addition, the facts in this case indicate that the newspaper ads should not have been completely discounted as a means to communicate with *Lechmere's* employees. The Union chose a newspaper advertisement as the first organizing

tactic on June 16, 1987, closely followed by several more. J.A. 116, 119; R.4-5. This can only mean that the Union itself had faith in their potential effectiveness.

When a union elects to employ full-page newspaper advertisements aimed at a specific group of employees, it is not fitting to label such an effort as a "flawed" means of communication due to greater expense and effort. *Cf. Jean Country*, 291 N.L.R.B. No. 4, slip op. at 8, 129 L.R.R.M. (BNA) at 1204. Only two months after deciding *Lechmere, Inc.*, the Board concluded that a union had reasonable alternatives to trespassing because it chose to use a mass media campaign of radio and television commercials in conjunction with picketing and handbilling at the perimeters of stores. *The Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989). The Board stated its reluctance to impose the cost of a media campaign upon the union, but as a voluntary undertaking this effort was considered part of the "reasonable alternative means" analysis. *Id.* slip op. at 10-11, 132 L.R.R.M. (BNA) at 1167-68. Lechmere deserved the same consideration.

In a related conclusion about the alleged inefficacy of newspaper advertising in this case, the Board cited ambiguous testimony to the effect that Lechmere "removed the advertisements from the newspapers delivered to this store," apparently to indicate that deliberate censorship further interfered with alternative means of communication. *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5 n.9, 131 L.R.R.M. (BNA) at 1482 n.9, Pet. B-5. The First Circuit concluded that Lechmere "systematically removed the ads from newspapers delivered to its Newington store." *Lechmere, Inc. v. NLRB*, 914 F.2d at 316, Pet. A-5.

Like so much else in the General Counsel's "facts" about the availability of reasonable alternative means, these conclusions are nothing more than unfounded inference. The actual testimony was very brief: the General Manager removed the Union's ads *and* retail competitors' ads from the Hartford

Courant delivered to the store. J.A. 96. There was no evidence that he did so *before* employees saw the ads, or that he deliberately censored all papers delivered to the store, or that he hid the ads from employees after he removed them from the paper. Any inference of censorship was further dispelled by the fact that only two weeks after organizing activity began, Lechmere sent a July 1, 1987 letter to employees containing a heading, "Newspaper Ads," and stating, "you may have noticed the coupons that have appeared in the newspaper ads . . . ." J.A. 91-92, 137-39; R.243-44.

The Board has broad investigatory powers.<sup>8</sup> To meet its burden of showing that no reasonable alternatives to trespass enabled the Union to reach Lechmere's employees, the General Counsel could have *asked* employees directly whether the Union's various forms of communication reached them. The Board's approach since *Jean Country* substitutes patronizing speculation and opinion for the actual experiences of employees, virtually eliminating the *Babcock & Wilcox* burden of proof.

### 3. *The Board Has Created An Impermissibly Low Standard For Establishing That The Use Of Alternative Communication Methods Is Not Reasonable.*

In addition to allowing unfounded inferences, conjecture and partial facts to satisfy the General Counsel's burden of proof, the Board and the First Circuit have given strong indications that a new and impermissibly easy standard for the

<sup>8</sup> The NLRB Casehandling Manual describes the investigation of an unfair labor practice charge as follows:

It is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party . . . [T]he Board agent should take all investigative steps, short of "fishing," in areas reasonably calculated to bring results.

NLRB Casehandling Manual §10056.4

"unreasonableness" of a communication method has emerged. The Board found that tracing license plate numbers to obtain names and addresses was *not* a reasonable alternative means to contact employees because: (1) this method is "flawed"; (2) "obstacles to comprehensive tallying of names and addresses are manifest"; and (3) the Motor Vehicle Registry is not effective as a "comprehensive source of the names and addresses of the employees." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5-6, 131 L.R.R.M. (BNA) at 1482, Pet. B-5—B-6. The First Circuit intimated likewise, citing *Lechmere's* "unwillingness to disclose the names and addresses of workers" (an inference on which there was no actual evidence because the Union never asked; J.A. 76), and describing accessibility to the workforce in terms of whether a union can obtain the names and addresses of employees through an employer-furnished list or otherwise. *Lechmere, Inc. v. NLRB*, 914 F.2d at 323 n.12, Pet. A-18—A-19.

This line of reasoning sets a new standard for what will constitute a "reasonable" alternative means of communication. "Flawed" methods that are not a "comprehensive source," or will not allow "comprehensive tallying of names and addresses", apparently will be considered enough to justify trespassing. The alternative means of communication found to be reasonable in *Babcock & Wilcox* (contacts on the street and at home, telephone calls, mail, and notices of meetings) were equally "flawed" using today's definition, and by no means constituted a "comprehensive source" for "comprehensive tallying of names and addresses." Indeed, nothing short of an employee list furnished to the Union would be a "comprehensive" alternative means for achieving employee contact.

By equating the concept of "reasonable" alternatives with "comprehensive" sources of names and addresses, the Board substantially departed from *Babcock & Wilcox* and even its own case law. See *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48, slip op. at 6, 131 L.R.R.M. (BNA) 1345, 1346 (1989)

(trespass is prohibited where reasonable alternatives are available, even if the alternatives are "not the *most* effective means") (emphasis supplied). The Board has, in effect, concluded that an alternative method to contact employees was unreasonable because it was not the *most* effective method.

4. *The Babcock & Wilcox Burden Of Proof Has Been Partially Shifted To Require The Employer To Show That Reasonable Alternative Communication Methods Existed.*

Finally, the First Circuit in *Lechmere, Inc.*, not only diluted the General Counsel's burden of proof of an unfair labor practice, but also to some extent shifted that burden onto the charged party, by noting that "there is no particular reason to believe that many of the affected employees actually saw the [newspaper] ads." *Lechmere, Inc.*, 914 F.2d at 316, Pet. A-5. The General Counsel carries the burden under *Babcock & Wilcox* to prove that the employees in fact did not see the ads, and hence were not reached. Any guesswork about this issue should not work against the party who bears no burden of proof.

The federal appellate courts have in the past felt it necessary to spurn the Board's attempts to shift this burden onto property owners. See *Belcher Towing Co.*, 238 N.L.R.B. 446, 474-78, 99 L.R.R.M. (BNA) 1566 (1978), *enforcement denied in relevant part*, 614 F.2d 88 (5th Cir. 1980), *remanded*, 256 N.L.R.B. 666, 107 L.R.R.M. (BNA) 1300 (1981), *rev'd* 683 F.2d 418, (11th Cir. 1982); *Sabine Towing & Transportation Co., Inc.*, 205 N.L.R.B. 423, 84 L.R.R.M. (BNA) 1275 (1973), *enforcement denied in relevant part*, 599 F.2d 663 (5th Cir. 1979). The shifting burden of proof is yet another indication of how far from *Babcock & Wilcox* the Board has taken this analysis.



*Jean Country* paid lip service to the *Babcock & Wilcox* principles by describing the General Counsel's burden as follows: "What is required is a clear showing, based on objective considerations, rather than subjective impressions, that reasonably effective alternative means were unavailable." *Jean Country*, 291 N.L.R.B. No. 4, slip op. at 7, 129 L.R.R.M. (BNA) at 1204. The "objective" considerations relied upon in this case were a series of opinions and conjectures about why employees *might* not have been reached by the Union's message. At least in part, the employees' failure to react to the Union's highly visible organizing efforts was construed to mean that the available channels of communication were not reasonable for protecting Section 7 rights. Alternative communication methods were deemed not reasonably effective because the Union could not easily and quickly compile a complete roster of Lechmere's employees.

This approach to the General Counsel's burden of proof all but guarantees protection for a union's trespassory organizational efforts in the large majority of cases. It creates a *de facto* reversal of *Babcock & Wilcox*, and belies the Court's characterization of this burden as "heavy."

## II. *Jean Country* AS APPLIED BETRAYS THE GENERAL RULE PROTECTING PROPERTY INTERESTS.

### A. *The Board's Case Law Trends Since Jean Country Make Infringement On Property Rights The Rule, Not The Exception.*

*Jean Country* as applied is obviously circumventing *Babcock & Wilcox*. In the overwhelming majority of cases in which the Board conducted a *Jean Country* accommodation analysis to determine whether a property owner violated Section 8(a)(1) by denying access to union agents, the Board

ruled that a violation had occurred.<sup>9</sup> Infringement on property rights has become the rule.

This may be attributable to the Board's failure after *Jean Country* to give sufficient deference to property rights, or to its failure to require a true showing of the necessity for trespass. Whatever the source, this trend has no basis in *Babcock & Wilcox*. Despite earlier pronouncements to the contrary, the Board has now distorted its application of *Babcock & Wilcox* to create a test that abrogates property rights merely because in most cases it is more convenient for unions to conduct Section 7 activity on private property than by using other means. Cf. *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706, 77 L.R.R.M. (BNA) 1913, 1914 (1971) ("the test established [in *Babcock & Wilcox*] was not one of relative convenience").

### B. *In Authorizing Trespassory Access The Board And The First Circuit Failed To Account For The Effect Of The Union Abusing The Exercise Of Section 7 Rights.*

In *Jean Country* the Board instructed that the strength of a

<sup>9</sup> See e.g., *Target Stores*, 300 N.L.R.B. No. 136 (1990); *Wegmans Food Markets, Inc.*, 300 N.L.R.B. No. 114 (1990); *Sparks Nugget, Inc.*, 298 N.L.R.B. No. 69, L.R.R.M. (BNA) 1121 (1990); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. (BNA) 1001 (1989), enforced 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 N.L.R.B. No. 9, 132 L.R.R.M. (BNA) 1005 (1989); *C.E. Wylie Const. Co.*, 295 N.L.R.B. No. 119, 132 L.R.R.M. (BNA) 1007 (1989); *Subbiondo and Assocs., Inc.*, 295 N.L.R.B. No. 132, 132 L.R.R.M. (BNA) 1006 (1989); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 N.L.R.B. No. 102, 131 L.R.R.M. (BNA) 1159 (1989); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331 (1989); *Mountain Country Food Stores, Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113 (1989).

Comparatively, there is a remarkably small number of cases in which the Board has applied a pure *Jean Country* analysis and ruled that access should be denied. See e.g., *Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989); *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989).

Section 7 right must be judged in part by "the manner in which the activity related to the right is carried out," and that a union can by misconduct "diminish" the strength of Section 7 rights. 291 N.L.R.B. No. 4, slip op. at 8, 20-21, 129 L.R.R.M. (BNA) at 1204, 1208. In the instant case there was evidence that the Union's organizing tactics included repeated trespassing into all areas of the parking lot and into the Lechmere store itself. See J.A. 18, 30-32, 35-36, 74-75. There was no further evidence about disruptive or inconvenient organizing tactics because the ALJ refused to allow such evidence into the record. The ALJ rebuffed Lechmere's offers of proof that Union representatives entered the store and confronted employees, distributed literature, stuffed literature into merchandise, entered warehouse areas not open to the public, left literature in restrooms and caused disturbances. See J.A. 30-34, 54, 55-56, 79-81, 84-85.

The Board then compounded this error by declaring that Lechmere's "assertions" about Union misconduct were not "evidence of . . . disruption or inconvenience." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 4 & n.7, 131 L.R.R.M. at 1482 n.7, Pet. B-4. The First Circuit enforced the Board's order in part because "[p]ermitting non-disruptive or minimally disruptive trespass constitutes a much gentler accommodation than insisting that a property right yield to organizational activity which threatens the normal operations of the owner's business." *Lechmere, Inc. v. NLRB*, 914 F.2d at 324, Pet. A-21. The Court of Appeals agreed "with other courts that in a trespassory solicitation case the extent of the union's intrusion affects whether the property right should prevail." *Id.*, Pet. A-21.

It requires a blind eye to find that the Union's trespassory organizational activity was non-disruptive, or minimally disruptive, or did not threaten the store's normal operations. It is speculative to assert a cause-and-effect relationship; *i.e.*, that Union agents entered the store only after, and because,

they were prevented from handbilling in the parking lot and at the store entrances.<sup>10</sup> Such a relationship would neither excuse nor lessen the impact of the Union's conduct in any event. It is equally possible that there was no causal relationship, and the Union would have entered the store even if it enjoyed a closer staging area on Lechmere's property.

There is a double standard at work. On one hand, Lechmere was held accountable for a single alleged attempt to move Union organizers from public property, despite the minimal effect this had on the Union's organizing efforts and the Union's ability to remain on the scene for months, without further incidents of such alleged interference.<sup>11</sup> See *Lechmere, Inc. v. NLRB*, 914 F.2d at 325, Pet. A-22—A-23. This is because "events must be judged in context," and "[a]ny course of conduct, no matter how enduring or persuasive, can be broken down into tiny particles and made to seem relatively benign." *Id.*, Pet. A-23.

On the other hand, the Union has not been held accountable for the entire context in which it attempted to organize Lechmere's employees, which included several instances of unjustified and disruptive misconduct. Only when broken down into tiny particles was this organizing campaign relatively benign.

The *Jean Country* analysis, with its balancing of rights, is analogous to a classic equitable test. The Union came before the Board with "unclean hands" — seeking to compromise Lechmere's recognized property rights, while at the same time repeatedly violating those rights beyond any justification. The Board both excluded and ignored evidence about these facts. The First Circuit approved. This application of the *Jean Country* analysis was arbitrary and not supported by substan-

<sup>10</sup> The General Manager remembered that the very first on-site organizing activity on June 18, 1987 involved a foray into the store. J.A. 80.

<sup>11</sup> Lechmere has not made this minor unfair labor practice finding part of its Petition for Writ of Certiorari.

tial evidence on the record as a whole. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

### III. DEFERENCE TO THE BOARD IS NOT WARRANTED.

#### A. *Lechmere, Inc. Is Not Distinguishable From The Decision Overturned By The Court Thirty-Five Years Ago In Babcock & Wilcox.*

Deference to the Board ultimately motivated the First Circuit's decision. See *Lechmere, Inc.*, 914 F.2d at 317, 325, Pet. A-7—A-8, A-21—A-22. The Board is entitled to some deference in assessing industrial reality, but when the Board "alters the balance of a framework carefully laid out by Congress and thoughtfully implemented by well-established Supreme Court doctrine," it is a judicial function to remedy the imbalance. *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Pet. A-24 (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1554 (1990) (Rehnquist, C.J., concurring)). The decision of the First Circuit is almost a perfect resurrection of the Board's position rejected by the Supreme Court in *Babcock & Wilcox*. See *Lechmere, Inc.*, 914 F.2d at 326-27 (Torruella, J., dissenting), Pet. A-24—A-25. The 1954 Board decision of *Babcock and Wilcox Co.* bears a surprising resemblance to the Board's 1989 treatment of *Lechmere, Inc.* Judge Torruella emphasized this similarity in his detailed discussion and chart comparing nine important factors. *Id.* at 327 (Torruella, J., dissenting), Pet. A-26. The Board's *deja vu* is troubling because the Supreme Court has spoken in the interim.

#### B. *The Board Has Demonstrated No Grounds To Depart From Established Supreme Court Precedent.*

The Board is entitled to adapt labor policy to address the "changing patterns of industrial life." See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board has announced no such influence behind its *Jean Country* rationale. Indeed, what has changed since 1956 to warrant revival of a discredited accommodation of rights? If anything, at present there is a more effective set of communication alternatives for union agents than there were in 1956. See e.g., *Babcock and Wilcox Co.*, 109 N.L.R.B. at 491 (noting that in 1954 only 60% of the workforce at Babcock & Wilcox even had a telephone). Judge Torruella observed in his dissent that in 1990, politicians and advertisers regularly communicate and successfully persuade people by using methods that the Board has now deemed ineffective for merely "reaching" people. See *Lechmere, Inc.*, 914 F.2d at 328 (Torruella, J., dissenting), Pet. A-28. Moreover, there evidently were no "changing patterns of industrial life" influencing the Supreme Court's 1978 *dicta* that authorized trespass is "rare and . . . is far more likely to be unprotected than protected", and an employer's right to bar non-employee union organizers from his property "remains the general rule." *Sears*, 436 U.S. at 205 (emphasis added).

#### C. *The Board's Historically Inconsistent Applications Of Babcock & Wilcox Further Reduce The Level Of Deference Required.*

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30



(1987). The *Jean Country* analysis, including *Lechmere, Inc.*, caps a long history of inexplicable inconsistency in the Board's treatment of *Babcock & Wilcox*, as shown by a sampling of case law over the past few decades.

In 1962 the Board (reversing the Trial Examiner) upheld an employer's right to bar union organizers from a private road that bisected a large factory and linked two public streets, even though "for the convenience of the public the [employer had permitted] limited use of the street as a passageway for pedestrians and motor vehicles," and the Trial Examiner concluded that it was a "public thoroughfare." *General Dynamics/Telecommunications, div. of General Dynamics Corp.*, 137 N.L.R.B. 1725, 1726-27, 50 L.R.R.M. (BNA) 1475, 1476 (1962). Citing *Babcock & Wilcox*, the Board found that the union organizers could adequately reach the 3,000 member target workforce by handbilling cars at three of the five gates into the plant (even though less than half the workforce used these means of access), by handbilling the 300 employees who walked to work, and by conducting small meetings at employees' homes and sending literature to small groups of employees. *Id.* at 1727-28, 50 L.R.R.M. (BNA) at 1476. It is notable that the union's organizing effort spanned four years, including handbilling on public property for six months before the union finally attempted to use the private roadway. *Id.* at 1726, 1728, and 1740, 50 L.R.R.M. (BNA) at 1477. The Board found no importance in the fact that ninety percent of the workforce lived in metropolitan Rochester, New York, a city of 350,000. *Id.* at 1726, 50 L.R.R.M. (BNA) at 1475. The Board also showed only slight concern that there was "some difficulty" posed to the organizers by heavy traffic entering the plant. *Id.* at 1728, 50 L.R.R.M. (BNA) at 1476. The union was implicitly faulted for "not avail[ing] itself of other channels of communication such as newspapers, radio, or television." *Id.*, 50 L.R.R.M. (BNA) at 1477.

Just six years later the Board announced a "big city rule" in

*Solo Cup Co.*, 172 N.L.R.B. 1110, 68 L.R.R.M. (BNA) 1385 (1968), *enforcement denied*, 422 F.2d 1149 (7th Cir. 1970). The Board protected the trespass of union organizers who handbilled on a privately owned street leading into an industrial park. The Board found that it was "virtually impossible" to meet employees away from the premises, because the plant and workforce were situated in metropolitan Chicago. *Id.* at 1110-11, 68 L.R.R.M. (BNA) at 1386. Similarly, it was ruled "virtually impossible to stand safely at [the nearest public street] intersection and successfully pass out literature of any kind because cars approaching the intersection turn both right and left." *Id.* at 1110, 68 L.R.R.M. (BNA) at 1386.<sup>12</sup> Newspapers, radio and television were ruled out because the union "would have a problem in any event deciding on the appropriate stations or newspapers and would not be able to reach employees *effectively* with its message through such media." *Id.* at 1111, 68 L.R.R.M. (BNA) at 1386 (emphasis in original). The private roadway itself was deemed "a quasi-public area" because members of the public were not barred, and the police, mail service, and other services all had access. *Id.*, 68 L.R.R.M. (BNA) at 1386.

A few years later the Board issued three decisions the same day, adding to the confusion surrounding *Babcock & Wilcox* access cases. In *Monogram Models, Inc.*, 192 N.L.R.B. 705, 77 L.R.R.M. (BNA) 1913 (1971), the Board (reversing the Trial Examiner) endorsed property rights over Section 7 rights, denying union organizers access to a plant parking lot. As in *General Dynamics, supra*, the Board was unconvinced that the admitted "difficulty" of handbilling in the press of traffic turning into the plant from a forty mile per hour roadway, and the plant's location in Chicago, were enough to warrant protected trespassing under *Babcock & Wilcox*. *Id.* at

<sup>12</sup> Note the similarity of these comments to the Board's 1954 conclusion that it was "impossible or unreasonably difficult" for the union to reach the *Babcock & Wilcox* workforce. *Babcock and Wilcox Co.*, 109 N.L.R.B. at 493-94, 34 L.R.R.M. (BNA) at 1374.

705-06, 77 L.R.R.M. (BNA) at 1914. The Trial Examiner had ruled that the case was "governed by *Solo Cup*." *Id.* at 712. The Board majority did not mention *Solo Cup*, but modified it in principle by refusing to adopt a "big city rule." *Id.* at 706, 77 L.R.R.M. (BNA) 1914.

In the second of the three cases, *Falk Corp.*, 192 N.L.R.B. 716, 77 L.R.R.M. (BNA) 1916 (1971), the Board upheld the Trial Examiner's ruling that union organizers could not trespass on a private viaduct leading into a large plant. The alternative means of communication available to the union included: handbilling employees (almost twenty-five percent of the workforce) who used pedestrian entrances and gathered at bus stops; a license plate check of cars entering and leaving the plant,<sup>13</sup> which led to mail and home contact; the erection of large banners near the plant; a single meeting that was announced in the banners and handbills; and newspaper, radio, and television advertising. *Id.* at 719-21, 77 L.R.R.M. (BNA) at 1919-21. According to the Board, the obvious deficiencies of license plate tracing were not critical — the union should not care that some supervisors or office workers received mail aimed at production workers; carpoolers usually alternate driving duties, so diligent license plate checks for many days could yield the identities of all members of a pool; carpoolers are likely to talk about any union message received only by the driver; and even if the list obtained by license plate tracing is overbroad or inaccurate, it can give the union a

<sup>13</sup> In *Falk Corp.*, a union organizer testified that with an "informal check" of license plates in his "spare moments" on eight to ten occasions within a month, sometimes even using his rear view mirror, he obtained a list of 593 names, only half of which turned out to be employees. *Falk Corp.*, 192 N.L.R.B. at 717-18. The Board adopted the Trial Examiner's finding that "with a little more effort" the union could have compiled "a much more comprehensive list of names and addresses of Falk employees who drive to work." *Id.* at 720, 77 L.R.R.M. (BNA) at 1919. Compare this to the Board's implicit endorsement of the Union's minimal license plate tracing efforts at *Lechmere* as "diligent." *Lechmere, Inc.*, 295 N.L.R.B. No. 15, slip op. at 5, 131 L.R.R.M. (BNA) at 1482, Pet. B-5.

foothold to obtain better information from interested employees who were accurately identified. *Id.* at 720, 77 L.R.R.M. (BNA) at 1919. The cost and effectiveness of advertisements in the news media did not factor their use completely out of the question. *Id.* at 721, 77 L.R.R.M. (BNA) at 1920-21.

The third case simultaneously issued was *Scholle Chemical Corp.*, 192 N.L.R.B. 724, 78 L.R.R.M. (BNA) 1009 (1971), enforced 82 L.R.R.M. (BNA) 2410 (7th Cir. 1972), in which a divided Board affirmed a Trial Examiner's finding that union organizers could trespass even though they were able to mail literature directly to 220 out of 350 employees. Despite this evidence, the Board held that reasonable alternative means of communication were not available because the plant and the employees' homes were located in Chicago, the employees entered and left work in a larger stream of workers from another nearby plant, and there was some physical risk and traffic disruption that could result from handbilling at the nearest public property. *Id.* at 729-30, 78 L.R.R.M. (BNA) at 1011. Like the Trial Examiner in *Monogram Models*, who was reversed, the Trial Examiner in *Scholle Chemical Corp.* had expressly relied upon *Solo Cup* to find that trespass was authorized. *Id.* at 730, 78 L.R.R.M. (BNA) at 1012. Thus, on the same day, the Board both rejected and endorsed the "big city" factor in the alternative means analysis.

In *Dexter Thread Mills d/b/a Lee Wards*, 199 N.L.R.B. 543, 81 L.R.R.M. (BNA) 1293 (1972), the Board reviewed facts indistinguishable in all major respects from *Lechmere, Inc.* and without difficulty came to the opposite conclusion. The organizing target was a retail store workforce; the site was in Elgin, Illinois, a "large metropolitan area" on the outskirts of Chicago; the property contained the store and a few other buildings, but was dominated by a large, open parking area; there were three driveways into the parking lot from a four lane, forty mile per hour highway; a ten foot wide grassy strip



of public property ran along the road; the target workforce numbered 350 to 450, working various shifts; sixty percent lived in Elgin; all came to work by private auto; store hours began at 9:00 a.m. and most of the employees came to work before that; and the union's organizing efforts included trips into the store; handbilling in the parking lot (all of which eventually was prevented by management); handbilling from public property; tracing license plate numbers; and mail and home visits, which were not very fruitful. *Id.* at 543-44, 81 L.R.R.M. (BNA) at 1293-94. The Board upheld the employer's property rights largely because it could "be assumed that the only automobiles going into Respondent's parking lot prior to 9:00 a.m. would belong to employees"; "it would have been relatively easy and safe for the union organizers to stand on the public easement . . . and copy the license numbers of cars"; and "[f]rom this, and through greater utilization of sympathetic employees, the Union could have obtained a fairly complete list of employees for direct home contact or for distribution of literature through the mails." *Id.* at 545, 81 L.R.R.M. (BNA) at 1295.

In the late 1970's and early 1980's the Board issued opinions that clearly foreshadowed the present state of affairs. In *Montgomery Ward & Co., Inc.*, 265 N.L.R.B. 60, 111 L.R.R.M. (BNA) 1345 (1982) and *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 100 L.R.R.M. (BNA) 1598 (1979), the Board addressed the issue of consumer or "area standards" picketing and handbilling, in which a union is appealing to the general public not to patronize an employer with whom the union has some dispute. In these cases the Board began to give heavy weight to the "openness to the public" of retail store premises as a factor supposedly reducing the "strength" of property rights. *Montgomery Ward*, 265 N.L.R.B. at 69; *Giant Food Markets*, 241 N.L.R.B. at 729, 100 L.R.R.M. (BNA) at 1600. In conjunction therewith, the Board found that unions engaged in consumer or area standards appeals could not rea-

sonably reach their intended audience (the public who came to shop at the target store) except by stationing their representatives immediately at the store entrance. *Montgomery Ward*, 265 N.L.R.B. at 68-69; *Giant Food Markets*, 241 N.L.R.B. at 728-29, 100 L.R.R.M. (BNA) at 1600. Purportedly relying on *Babcock & Wilcox*, the Board resolved this conflict in favor of Section 7 rights, despite expressing concern that it was protecting an exercise of rights "not for the benefit of the Employer's employees, but rather for the benefit and protection of complete strangers to this employment relationship," and therefore that a good argument could be made that "such picketing should not be allowed on the Employer's premises." *Giant Food Markets*, 241 N.L.R.B. at 728, 100 L.R.R.M. (BNA) at 1599.

In 1986 the Board attempted to remove "reasonable alternative means" from the primary *Babcock & Wilcox* inquiry, reducing this crucial issue to a tie-breaker when the Board deemed that apples equaled oranges; *i.e.*, that property rights were as "strong" as Section 7 rights. *Fairmont Hotel*, 282 N.L.R.B. 139, 123 L.R.R.M. (BNA) 1257 (1986). Fueling this action was the Board's conclusion, based upon *Giant Food Markets*, that use of the reasonable alternative means test meant that "a union engaging in area-standards activity would inevitably find it easier to establish its right to access than a union engaged in organizing activity." *Fairmont Hotel*, 282 N.L.R.B. at 141, 123 L.R.R.M. (BNA) at 1259. The short-lived *Fairmont Hotel* analysis then ended in 1988 with *Jean Country*, but not before the Board issued a stream of *Fairmont Hotel* cases marked by concurrences in the outcomes, and extensive dissonance in the rationale.<sup>14</sup>

<sup>14</sup> See, e.g., *Homart Development Co.*, 286 N.L.R.B. 714, 126 L.R.R.M. (BNA) 1244 (1987); *Emery Realty, Inc.*, 286 N.L.R.B. 372, 126 L.R.R.M. (BNA) 1241 (1987), enforced, 863 F.2d 1259 (6th Cir. 1988); *L&L Shop Rite, Inc.*, 285 N.L.R.B. 1036, 126 L.R.R.M. (BNA) 1151 (1987); *Sisters International, Inc.*, 285 N.L.R.B. 796, 126 L.R.R.M. (BNA) 1148 (1987); *Skaggs Companies, Inc.*, 285 N.L.R.B. 360, 126 L.R.R.M. (BNA) 1149 (1987); *Providence Hospital*, 285 N.L.R.B. 320, 126 L.R.R.M. 1145 (BNA)



This is a glimpse of the confusing thicket into which litigants have traveled since *Babcock & Wilcox*. This succession of cases is inconsistent and irreconcilable. Moreover, the Board now seems to have reached a point of routinely granting trespassory access largely in order to "cure" a logical inconsistency that is entirely of its own making — the notion that "weak" Section 7 rights such as area standards activity deserve protection to the point of trespassing, because alternative means of reaching the intended audience are more difficult to find than those available in an organizing context. See *Giant Food Markets*, 241 N.L.R.B. at 728, 100 L.R.R.M. (BNA) at 1599-1600.<sup>15</sup>

Finally, even the Board's post-*Jean Country* cases have displayed some puzzling and pivotal inconsistencies. In *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989), the union's choice to use a mass media campaign was factored into the reasonable alternative means equation and trespassory access was denied. In *Lechmere, Inc.*, the Union's choice to use full-page newspaper advertisements was

(1987); *Smitty's Super Markets, Inc.*, 284 N.L.R.B. 1188, 125 L.R.R.M. (BNA) 1268 (1987); *Greyhound Lines, Inc.*, 284 N.L.R.B. 1138, 125 L.R.R.M. (BNA) 1266 (1987); *Schwab Foods, Inc.*, 284 N.L.R.B. 1055, 125 L.R.R.M. (BNA) 1225 (1987); *Browning's Foodland, Inc.*, 284 N.L.R.B. 939, 125 L.R.R.M. (BNA) 1264 (1987); *United Supermarkets, Inc.*, 283 N.L.R.B. 814, 125 L.R.R.M. (BNA) 1069 (1987).

<sup>15</sup> Although this issue is not directly presented on these facts, it is not a conundrum, as the Board apparently perceives it to be. The Court has recognized that area standards picketing is not likely to be "entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation." *Sears*, 436 U.S. at 206 & n.42. It is thus legitimate to impose an even heavier burden upon a union seeking to compromise recognized property rights when it does not involve the exercise of a "core" Section 7 right. That greater burden can be framed by imposing an even more challenging set of "reasonable" alternatives upon unions exercising other than core Section 7 rights — alternatives such as more frequent or sustained use of mass media, mass leafletting on public property, or mass mailings to the public — the "usual channels" for appealing to the public at large.

practically disregarded. In *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989), the Board found that property rights prevailed over Section 7 rights merely because five union agents peacefully congregated in a small area near the entrance to the store, making customer access somewhat more difficult. Lechmere was prepared to prove much more serious misconduct, and the evidence was excluded. J.A. 30-34, 54, 55-56, 79-81, 84-85.

This history of inconsistency is deserving of no great deference. The *Jean Country* accommodation itself and as applied is an attempt to circumvent if not reverse *Babcock & Wilcox*. The Court should not defer to this unfounded abrogation of recognized property rights.

#### IV. THE COURT SHOULD REAFFIRM *Babcock & Wilcox* PRINCIPLES AND CORRECT THE DEFICIENCIES IN THE *Jean Country* ANALYSIS THAT SO READILY CAUSE ABROGATION OF PROPERTY RIGHTS.

The *Sears dicta* accurately depicted the *Babcock & Wilcox* holding. Instances of trespass protected by Section 7 should be rare, and trespass should be far more likely to be unprotected than protected. *Sears*, 436 U.S. at 205. The right to bar non-employee union organizers from private property must remain the general rule, and the burden of justifying an intrusion into recognized property rights should be suitably heavy. *Id.* No intrusion into private property should even be considered without a strong showing that the intended audience is inaccessible to normal means of contact.

A union seeking protection for trespassing therefore must produce more than a lack of employee response and guesswork about whether employees have heard the message, to show that non-trespassory means of communication are unavailable. To justify trespass the union must show that its available communication methods are futile, not just flawed;

and that the workforce is beyond reach, not just unresponsive. Because the proper test involves the *availability* of alternative methods of contact, it will be a highly unusual factual setting in which a union can show the need to trespass without having tried other means to contact employees. A union seeking to trespass on the theory that employees are *per se* out of reach bears the heaviest of burdens.

The *Babcock & Wilcox* Court instructed the Board to accommodate property rights and Section 7 rights with as little destruction of one as is consistent with maintenance of the other. 351 U.S. at 112. The *Jean Country* analysis inherently presumes that organizing rights are likely to be destroyed unless, in a great many circumstances, the union can meet employees at the workplace door. This conclusion plainly provokes almost casual disregard of property rights, particularly those of employers whose premises are open to the public.

Among its many faults, the *Jean Country* analysis thus contains an almost patronizing view of the employees who are at the center of this controversy. *Babcock & Wilcox* protected the right of *employees* to become aware of the existence and potential benefits of unionization. Mature individuals, having been reached by an appeal to organize and form a union, can decide for themselves whether to pursue the matter.<sup>16</sup> *Jean Country*, at the expense of property rights, expansively protects the ability of unions to get closer to a workforce that may simply be unreceptive to the union's appeal. The difference between employees' rights and union organizers' rights is "one of substance." *Babcock & Wilcox*, 351 U.S. at 113. *Jean Country* fails to make this distinction.

<sup>16</sup> See, e.g., *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313, 94 L.R.R.M. (BNA) 1705, 1708 (1977) ("[W]e believe that Board rules in this area must be based upon a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.")

## CONCLUSION

The judgment and decree of the United States Court of Appeals should be reversed and enforcement of the order of the National Labor Relations Board denied.

Respectfully submitted,

ROBERT P. JOY,

*Counsel of Record*

KEITH H. McCOWN

BENJAMIN SMITH

MORGAN, BROWN & JOY

One Boston Place

Boston, Massachusetts 02108

*Counsel for Petitioner,*

*Lechmere, Inc.*

JUN 24 1991

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

---

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

---

**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

---

KENNETH W. STARR  
*Solicitor General*

CHRISTOPHER J. WRIGHT  
*Acting Deputy Solicitor General*

MICHAEL R. DREEBEN  
*Assistant to the Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

JERRY M. HUNTER  
*General Counsel*

D. RANDALL FRYE  
*Acting Deputy General Counsel*

NORTON J. COME  
*Deputy Associate General Counsel*

LINDA SHER  
*Assistant General Counsel*

LAURENCE S. ZAKSON  
*Attorney*  
*National Labor Relations Board*  
*Washington, D.C. 20570*

---



### **QUESTION PRESENTED**

Whether the National Labor Relations Board reasonably concluded that the owner of a store in a shopping plaza violated Section 8(a)(1) of the National Labor Relations Act by barring nonemployee union personnel from distributing organizational literature to store employees in the plaza's parking lot.

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statutory provisions involved .....	2
Statement .....	2
A. The underlying controversy .....	2
B. Proceedings before the Board .....	6
C. The court of appeals decision .....	9
Summary of argument .....	11
Argument:	
A. The Board's task under <i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956), is to strike a reasonable accommodation between property rights and Section 7 rights .....	14
B. The approach set out in <i>Jean Country</i> reasonably fulfills the Board's charge to accommodate competing interests .....	24
C. The Board properly determined that the union must be allowed access to petitioner's parking lot .....	33
Conclusion .....	42

## TABLE OF AUTHORITIES

### Cases:

<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968) .....	17
<i>American Hospital Ass'n v. NLRB</i> , 111 S. Ct. 1539 (1991) .....	18
<i>Babcock &amp; Wilcox Co.</i> , 109 N.L.R.B. 485 (1954) .....	15
<i>Belcher Towing Co. v. NLRB</i> , 614 F.2d 88 (5th Cir. 1980) .....	37
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978) .....	23

## IV

## Cases—Continued:

## Page

<i>C. E. Wylie Construction Co.</i> , 295 N.L.R.B. No. 119 (July 31, 1989), enforced, No. 90-70033, (9th Cir. June 3, 1991) .....	32
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	17, 22, 33-34
<i>Chugach Alaska Fisheries</i> , 295 N.L.R.B. No. 8 (June 15, 1989) .....	20, 33
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	15, 28
<i>Fairmont Hotel Co.</i> , 282 N.L.R.B. 139 (1986) .....	7, 19, 21
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987) .....	18
<i>Giant Food Markets v. NLRB</i> , 633 F.2d 18 (6th Cir. 1980) .....	22
<i>Hardee's Food Systems, Inc.</i> , 294 N.L.R.B. No. 48 (May 31, 1989), aff'd sub nom. <i>Laborers' Local Union No. 204 v. NLRB</i> , 904 F.2d 715 (D.C. Cir. 1990) .....	25, 31
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	7, 11, 13, 14, 16, 17, 18, 22, 29, 31
<i>Husky Oil, N.P.R. Operations, Inc. v. NLRB</i> , 669 F.2d 643 (10th Cir. 1982) .....	37, 39
<i>Jean Country</i> , 291 N.L.R.B. 11 (1988) .....	7, 11, 14, 18, 19, 20, 21, 22, 30
<i>John Bancroft &amp; Sons</i> , 140 N.L.R.B. 1288 (1963) ..	40
<i>Laborers Local Union No. 204 v. NLRB</i> , 904 F.2d 715 (D.C. Cir. 1990) .....	20
<i>Litton Financial Printing Division v. NLRB</i> , No. 90-285 (June 13, 1991) .....	18
<i>Lloyd Corp. v. Tanner</i> , 407 U.S. 551 (1972) .....	17
<i>Mayer Group</i> , 296 N.L.R.B. No. 9 (Aug. 9, 1989) ..	32
<i>Montgomery Ward &amp; Co. v. NLRB</i> , 728 F.2d 389 (6th Cir. 1984) .....	28
<i>National Maritime Union v. NLRB</i> , 867 F.2d 767 (2d Cir. 1989) .....	37, 38, 40
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) .....	passim
<i>NLRB v. City Disposal System, Inc.</i> , 465 U.S. 822 (1984) .....	34
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 110 S. Ct. 1542 (1990) .....	18

## V

## Cases—Continued:

## Page

<i>NLRB v. S &amp; H Grossinger's, Inc.</i> , 372 F.2d 26 (2d Cir. 1967) .....	27
<i>NLRB v. Seven-Up Bottling Co.</i> , 344 U.S. 314 (1953) .....	37
<i>NLRB v. United Aircraft Corp.</i> , 324 F.2d 128 (2d Cir. 1963), cert. denied, 376 U.S. 951 (1964) .....	27, 38
<i>NLRB v. United Food &amp; Commercial Workers Union</i> , 484 U.S. 112 (1987) .....	32
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975) .....	18, 36
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980) .....	30
<i>Red Food Stores, Inc.</i> , 296 N.L.R.B. No. 62 (Aug. 31, 1989) .....	27, 37
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	15, 36
<i>Richway Div. of Federated Dep't Stores</i> , 294 N.L.R.B. 49 (May 31, 1989) .....	26
<i>SCNO Barge Lines</i> , 287 N.L.R.B. 169 (1987), aff'd sub nom. <i>National Maritime Union v. NLRB</i> , 867 F.2d 767 (2d Cir. 1989) .....	20
<i>Scott Hudgens</i> , 230 N.L.R.B. 414 (1977) .....	21, 34
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978) .....	7, 23, 24, 32, 33, 36
<i>Sentry Markets</i> , 296 N.L.R.B. No. 5 (Aug. 10, 1989), enforced, 914 F.2d 113 (7th Cir. 1990) ..	21, 27
<i>Subbiondo &amp; Associates</i> , 295 N.L.R.B. No. 132 (July 31, 1989) .....	32
<i>Tecumseh Foodland</i> , 294 N.L.R.B. No. 37 (May 31, 1989) .....	35
<i>Trident Seafood</i> , 293 N.L.R.B. No. 125 (May 12, 1989) .....	33
<i>W.S. Butterfield</i> , 292 N.L.R.B. No. 8 (Dec. 20, 1988) .....	40

## Constitution and statutes:

## U.S. Const.:

Amend. I .....	17, 29, 30
Amend. V .....	30



## Statutes—Continued:

## Page

National Labor Relations Act, 29 U.S.C. 151 <i>et</i> <i>seq.</i> .....	35
§ 1, 29 U.S.C. 151 .....	35
§ 7, 29 U.S.C. 157 .....	<i>passim</i>
§ 8(a) (1), 29 U.S.C. 158(a) (1) .....	2, 6, 9, 11, 17, 26

## In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-970

LECHMERE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 914 F.2d 313. The Board's decision and order (Pet. App. B1-B29) are reported at 295 N.L.R.B. No. 15.

## JURISDICTION

The judgment of the court of appeals was entered on September 17, 1990. A petition for rehearing was denied on October 25, 1990. Pet. App. C1. The petition for a writ of certiorari was filed on December 17, 1990, and granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

### STATEMENT

#### A. The Underlying Controversy

1. Petitioner operates a number of retail stores that sell "hard" goods, such as televisions, audio equipment, and appliances. One of its stores is located in the Lechmere Shopping Plaza (Plaza) in Newington, Connecticut. Newington is part of the Greater Hartford metropolitan area, which encompasses Newington, Hartford, and New Britain and has approximately 900,000 residents. Petitioner's Newington store (Store) employs about 200 employees, many of whom work part-time. Pet. App. A26, B4-B5, B10, B19; J.A. 17, 114, 116, 76-77, 98-99.

The Plaza occupies a roughly rectangular parcel measuring approximately 880 feet from north to south and 740 feet from east to west. The Store is located at the property's south end. The main parking lot is to the north of the Store. A smaller parking lot, used principally by customers picking up parcels, is to the east of the Store. A strip of 13 smaller "satellite stores" not owned by petitioner runs along the west side of the Plaza, facing the

main parking lot. At the time of the events at issue, four of the satellite stores were open for business. Two public telephones are located in front of the satellite stores. Pet. App. B3, B10-B12; J.A. 72-73, 114-115.

Petitioner owns the property on which the Store is situated and an unrelated enterprise owns the property on which the satellite stores are situated. Ownership of the remainder of the Plaza, including the parking lot, is divided nearly equally between the two. The parking lot contains no lines or barriers to indicate where these ownership interests begin and end. Employees of the Store who drive to work are instructed to park in the northeast corner of the main parking lot. Pet. App. B3, B11-B12; J.A. 20, 66-67, 115, 121.

The Plaza is bounded on the east by the Berlin Turnpike, a four-lane, divided highway with a 50 m.p.h. speed limit, and on the north by Pascone Street. The main entrance to the Plaza is from the Berlin Turnpike; there is no traffic signal or stop sign at this entrance. There is also a narrow delivery entrance from the Turnpike that provides access to a loading dock at the rear of the Store, and an entrance to the Plaza from Pascone Street. Pet. App. B11-B12; J.A. 75-76, 116, 121. A grassy strip about 46 feet wide runs the entire length of the Plaza along the Turnpike, broken only by driveways providing access to the Plaza. Petitioner owns a four-foot-wide portion of the grassy strip abutting its parking lot; the remainder of the strip is public property. Pet. App. B11; J.A. 114-115, 121.

The main entrance has a sign identifying two of the stores on the Plaza, including petitioner's store. There are no signs at the entrances to the parking lot or in the parking lot itself announcing any restriction

on access to, or use of, the parking lot. At each of the entrances to the Store, six-by-eight-inch signs state: "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises." Petitioner has a consistently enforced policy prohibiting nonemployees from soliciting and distributing literature in the Store and on the parking lot. Pet. App. B3-B4, B12-B13; J.A. 59-61, 64, 66, 68, 115-116.

2. On June 16, 1987, Local 919, United Food and Commercial Workers (Union) began an effort to organize the employees at the Store. Initially, it ran several advertisements in the *Hartford Courant*, a general circulation newspaper that serves the Greater Hartford area. The advertisements were addressed to the Store's employees, told of the benefits available with the Union, and included a union authorization card with a caption reading "Mail Today," or "Mail It Now." Petitioner's store manager, Roger Samuelson, removed these advertisements from the copies of the paper received at the Store. Pet. App. B5 & n.9, B13, B18 & n.6; J.A. 96, 119.

On June 18, several Union representatives went to the Plaza's parking lot about 45 minutes before the Store opened for business at 10 a.m. They placed handbills on the windshields of cars parked in the northeast corner of the parking lot, where petitioner's employees had been told to park. The handbills described the advantages of the Union and included a union authorization card with a postage-paid return envelope. Pet. App. B14 n.3; J.A. 21, 135-136. Shortly after the organizers began their handbilling, the Store's assistant manager, Steve Mittler, approached them, told them of petitioner's policy against solicitation and distribution, and instructed them to leave. The organizers did so, and petitioner's security

guards immediately confiscated the handbills. Pet. App. B13-B14; J.A. 18-21, 22-24. Union representatives returned to the Plaza twice that day to distribute handbills. Each time, petitioner's officials told them to leave, and petitioner's security guards confiscated the handbills placed on windshields. Pet. App. B13-B14; J.A. 19-20, 52.

On June 20, four Union representatives entered the Plaza's parking lot and began placing handbills on the windshields of cars parked in the area used by petitioner's employees. Almost immediately, Samuelson asked them to leave. They complied. The Union representatives then decided to attempt to pass out handbills to employees by situating themselves on what they correctly understood to be public property abutting the main entrance to the Plaza. Pet. App. B14-B18, B24-B25; J.A. 25, 35-36. Within about five minutes, Samuelson, Mittler, and three security guards approached the Union representatives and demanded that they leave what Samuelson claimed was petitioner's property. When the representatives refused, Samuelson called the police. Pet. App. B14-B17, B24-B25; J.A. 25, 53, 82, 109-111. When the police arrived, a police officer told the Union representatives that they had the right to remain on the grassy strip as long as they stayed on the portion that was public property adjacent to the Berlin Turnpike. He also warned them to be careful because distributing literature from that vantage point was dangerous due to its proximity to the Turnpike. Pet. App. B14-B15, B24; J.A. 26, 37, 51-52, 53, 83-84.

By standing on the strip of public land adjacent to the parking lot, Union representatives attempted to compile a list of employee names and addresses by recording the license plate numbers of the cars parked



where petitioner's employees were supposed to park. The Union took the numbers to the Connecticut Motor Vehicle Registry, which supplied the names and addresses of the registered owners. Through these efforts, the Union secured the names and addresses of 41 employees, or about one-fifth of petitioner's work force. Pet. App. B5 & n.10, B18-B19; J.A. 37-39, 41, 42-43. The Union sent four mailings of literature to the 41 employees and made about ten home visits. It also attempted to reach the employees by phone, but succeeded in contacting only two employees. Nearly half of the 41 employees had unlisted numbers, and many were high school students whose parents refused to allow the organizers to speak with them. Pet. App. B5 n.10, B18-B19; J.A. 38-39, 46.

#### B. Proceedings Before The Board

Upon charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by denying the nonemployee union organizers access to the parking lot for the purpose of giving handbills to employees, thereby interfering with the employees' rights under Section 7 of the Act, 29 U.S.C. 157.<sup>1</sup>

<sup>1</sup> Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Union has a derivative Section 7 right to communicate with the employees because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages

Pet. App. B2; J.A. 128-131. The administrative law judge found a violation of Section 8(a)(1), applying the mode of analysis set forth in *Fairmont Hotel Co.*, 282 N.L.R.B. 139 (1986). Pet. App. B22-B23. The Board, applying the revised analysis in access-to-property cases it announced in *Jean Country*, 291 N.L.R.B. 11 (1988), affirmed the finding of a violation. Pet. App. B1-B7.

In *Jean Country*, the Board reexamined the analytical approach for resolving conflicts between Section 7 rights and property rights in light of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), *Hudgens v. NLRB*, 424 U.S. 507 (1976), and its past experience. The Board concluded that "in all access cases" it would balance "the degree of impairment of the Section 7 right if access should be denied \* \* \* against the degree of impairment of the private property right if access should be granted," and that an "especially significant" consideration in this balancing process would be "the availability of reasonably effective alternative means" of communication. *Jean Country*, 291 N.L.R.B. at 14.

Applying the *Jean Country* analysis, the Board stated that the right at issue is the right of the employees to organize, which is "at the very core" of the Act. Pet. App. B4, quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). It added that, since the Union's handbilling occurred in a parking lot and did not impede traffic flow or interfere with the lot's normal use, the handbilling did not "disrupt[]" petitioner's business or significantly "inconvenience[]" its customers. Because neither the handbilling's lo-

of self-organization from others." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

cation nor the Union's conduct diminished "the strength of the core Section 7 right asserted," the Board concluded that the Section 7 right should be protected against "substantial impairment." Pet. App. B4.

The Board also observed that petitioner had a "relatively substantial" property interest in its parking lot, but noted that the interest was qualified by the fact that the parking lot was "essentially open to the public." Pet. App. B4. The Board pointed out that petitioner "shares ownership in the parking lot \* \* \* with the operators of a strip of 13 stores," and that the "parking lot is available for use by patrons and employees of all the stores." *Id.* at B3.

The Board then found that there were "no reasonable, effective alternative means available for the Union to communicate its message to [petitioner's] employees." Pet. App. B4. The Board explained that, in the "large 'suburban-urban'" setting of Greater Hartford, the use of mass media—such as newspapers, radio, and television—was "both expensive and ineffective" as a means of communicating with petitioner's 200 employees. *Id.* at B4-B5. The Board also found that, despite the Union's "diligence and perseverance," the "obstacles to comprehensive tallying of [employees'] names and addresses" from license plate numbers of cars parked in the Plaza parking lot were "manifest." *Id.* at B5. The Board further found that the high speed of traffic on the Berlin Turnpike made the adjacent grassy strip of public property "an ineffective and unsafe locale for the union activity." *Id.* at B6.

The Board concluded that the serious impairment of the employees' Section 7 right to organize if union agents were denied access to petitioner's parking lot outweighed the insubstantial impairment of petition-

er's property right if access were granted.<sup>2</sup> It therefore found a violation of Section 8(a)(1) of the Act.<sup>3</sup> Pet. App. B6-B7.

### C. The Court of Appeals' Decision

The court of appeals enforced the Board's order. After reviewing *NLRB v. Babcock & Wilcox Co.*, *supra*, and later decisions of this Court discussing the right of access to private property under Section 7, Pet. App. A10-A12, the court concluded that the Board's *Jean Country* approach to the accommodation of conflicting rights in such cases is a "reasonable interpretation of the Act" that "meld[s] harmoniously with binding precedent." *Id.* at A14. The court specifically rejected petitioner's contention that *Jean Country*'s balancing test conflicts with the general approach delineated in *Babcock* or the specific holding of that case. *Id.* at A12 & n.5, A14, A17-A18.

The court also rejected petitioner's contention that the Board had incorrectly applied the *Jean Country*

---

<sup>2</sup> The Board explained that the impairment of petitioner's property interest caused by granting the union access "would not be substantial \* \* \* in light of the unobtrusive manner in which the Union carried out its distribution of leaflets and the fact that [petitioner's] parking lot is essentially open to the public. By contrast, in the absence of a reasonabl[e] alternative means of communication, the Union's Section 7 right would be severely impaired—substantially destroyed within the meaning of *Babcock & Wilcox* without entry into [petitioner's] property." Pet. App. B6 (footnote and internal quotation marks omitted).

<sup>3</sup> The Board also concluded that petitioner violated Section 8(a)(1) of the Act by attempting to eject the organizers from public property abutting its parking lot, and that petitioner's installation of a video camera to monitor exterior areas adjacent to the Store did not violate the Act. Pet. App. B2, B25-B26. Those findings are not at issue here.



principles in this case. Pet. App. A14-A22. The court agreed with the Board that a core Section 7 right was at issue; that the exercise of that right would not interfere with petitioner's business; and that, in the absence of effective alternative means of communication, the Section 7 right at stake would be "substantially destroyed." *Id.* at A15.

Turning to "the crux of the dispute," the court upheld the Board's finding that the Union had no effective alternative means to reach petitioner's "work force with its organizational message." Pet. App. A16, A22. In contrast to *Babcock*, where this Court found reasonable alternatives to exist, the court of appeals noted that, without access to the parking lot, petitioner's employees could not be reached: "employees are not easily accessible or identifiable," the area involved in this case is "much more populous," and the Union's "good-faith effort to explore alternative routes" revealed that other means of communication were ineffective. *Id.* at A17-A18. The court also noted that the use of mass media would be prohibitively expensive, and that, without access, there was no way for the Union to speak with employees in person, which is particularly important in an organizing setting. *Id.* at A19. Moreover, the court noted that the impact on property rights here is much less significant than in *Babcock*. That case involved a claim of access to a private and secluded factory parking lot fenced off from the public; here, the union sought admission to petitioner's publicly accessible parking lot in a way that would be "minimally intrusive." *Id.* at A17, A19. Accordingly, the court upheld the Board's conclusion that the denial of access violated the Act.<sup>4</sup>

<sup>4</sup> One judge dissented, finding this case indistinguishable from *Babcock*. Pet. App. A24-A28. The dissenting judge also

## SUMMARY OF ARGUMENT

Relying on the right to organize protected by Section 7 of the National Labor Relations Act, the Union sought access to petitioner's shopping center parking lot to give union literature to petitioner's employees. Relying on its ownership of the parking lot, petitioner denied access. The issue in this case is whether the Board reasonably concluded, under its approach in *Jean Country*, 291 N.L.R.B. 11 (1988), that petitioner's denial of access constituted an unfair labor practice under Section 8(a)(1) of the Act because it "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise" of a core Section 7 right.

A. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), the Court declared that when the exercise of Section 7 rights conflicts with property rights, the Board must reach an "[a]ccommodation" between the two rights "with as little destruction of one as is consistent with the maintenance of the other." Although access is not always required, state-created property rights must yield to Section 7 rights when the persons seeking access have no alternative means effectively to engage in the organizational activity protected by the Act. 351 U.S. at 112-113. In *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), the Court explained that "[t]he locus of th[e] [*Babcock*] accommodation \* \* \* may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and

took issue with the *Jean Country* test, contending that it slights such alternative methods of communication as newspapers, radio, and television, and that the test equates the employees' lack of response to the union's message with the absence of adequate means for the union to reach employees. *Id.* at A28-A33.



private property rights asserted in any given context."

The Board's *Jean Country* decision structures the requisite accommodation in the fashion prescribed by this Court's decisions. Under *Jean Country*, the Board considers the degree of impairment of the property right and the Section 7 right that would result from a grant or a denial of access, with particular attention to the issue of whether other means of communication would serve as a reasonable alternative to access. The weighing of those variables accords with the Court's general approach outlined in *Babcock* and *Hudgens*, and fulfills the Board's mandate to ensure that neither Section 7 rights nor property rights are impaired more than necessary.

Contrary to petitioner's assertions, nothing in *Babcock* requires the Board to tilt the scales in favor of property rights, and subjugate Section 7 rights, in all but the most unusual situations. The regime contemplated in *Babcock* is evenhanded: when the federal rights secured by the Act cannot reasonably be effectuated through communication away from the employee's property, access can be required. The Board's approach recognizes the need to exercise judgment about the degree of impairment of conflicting rights that is acceptable in each situation, and its interpretation of the Act is entitled to deference.

B. On a more detailed level, the *Jean Country* formulation is sound in the manner in which it weighs the rights implicated in a particular case and evaluates alternative means. First, the Board need not consider, as a threshold inquiry, whether alternative means are available in the abstract; to do justice to its task of minimizing the impairment of competing interests, the Board must weigh those inter-

ests in determining whether an alternative means of communication constitutes a sufficient alternative to access. Second, the Board properly considers it to be a lesser intrusion on property rights to require limited access to open property than to fenced and inaccessible property. Here, petitioner has issued a general invitation to the public to enter its parking lot; the incremental intrusion of allowing the Union access for a finite purpose is not substantial. Third, petitioner is wrong in contending that the Board's determination on the reasonableness of alternatives is influenced by whether employees respond to the Union's message; the Board's concern is that the message "reach" the employees. Fourth, the Board's balancing approach is compatible with predictable outcomes; the process of adjudication is developing general rules to apply in "each generic situation." *Hudgens*, 424 U.S. at 522.

C. Finally, the Board's determination that the Union is entitled to access to petitioner's parking lot should be upheld. The organizational rights at stake are at the core of the Act; the Union's access to the parking lot will cause only minimal impairment to a property right; and, without access, the Section 7 right will be significantly impaired. The alternative means available to the Union to contact employees are newspapers (or other media advertising), collection of license plate numbers to generate a list of employees' names and addresses, and handbilling from a strip of land that is dangerously near to the Turnpike and not immediately accessible to petitioner's parking lot. These flawed options are a far cry from the alternative methods of making contact with employees that were readily available in the small-town setting in *Babcock*; here, the Board found that, with-

out access, petitioner's employees could not realistically be reached. The Board's order, which allows the Union to enter petitioner's parking lot to distribute organizational handbills in a manner that will not interfere with petitioner's business, is a legitimate means to effectuate the rights protected by federal law.

### ARGUMENT

#### A. The Board's Task Under *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), Is To Strike A Reasonable Accommodation Between Property Rights And Section 7 Rights

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations, \* \* \* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. When Section 7 activity is sought to be conducted on an employer's private property, the Section 7 right may collide with the employer's property right. In those cases, it is the responsibility of the Board to strike a reasonable "[a]ccommodation between employees' § 7 rights and [the] employer's property rights." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). In *Jean Country*, 291 N.L.R.B. 11 (1988), the Board developed a balancing test to accommodate the respective interests. Petitioner's fundamental submission is that the Board's decision in *Jean Country* conflicts with *Babcock* by failing to give sufficient deference to property rights.

1. *Babcock* was this Court's first encounter with the relationship between property rights and Section 7 rights as exercised by nonemployees. In that case, the Court declared that when the exercise of Section 7 rights conflicts with property rights, the Board must

accommodate the two rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The dispute in *Babcock* arose when a manufacturer barred outside union organizers from distributing handbills in the parking lot of its plant. The plant and the parking lot were closed to the public, surrounded by a fence, and located in a rural area about one mile from a town of 21,000 people. About 40% of the plant's 500 employees lived in the town, while the rest resided within a 30-mile radius. The union had contacted more than 100 of the employees through the mail, and had spoken with other employees on the streets, at their homes, or over the telephone. More than 90% of the employees drove to work, but there was no safe public property near the plant to use in distributing literature to them; accordingly, the organizers sought access to the employer's private parking lot. *Id.* at 106-107. The Board concluded that the employer had committed an unfair labor practice by denying access to its property, without regard to whether the organizers had alternative means to communicate their message.<sup>5</sup> *Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954).

This Court held that the Act required "a distinction between rules of law applicable to employees and

---

<sup>5</sup> In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798-799 (1945), the Court had upheld the Board's rule that employees have a Section 7 right to engage in union solicitation on the employer's property, without regard to whether "the plant's physical location ma[kes] solicitation away from company property ineffective to reach prospective union members." See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570-571 (1978). In cases preceding its decision in *Babcock*, the Board had extended the rule of *Republic Aviation* to apply to non-employees as well. See *Babcock*, 351 U.S. at 111 & n.4.



those applicable to nonemployees." *Babcock*, 351 U.S. at 113. In nonemployee access cases, "if reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message," an employer may enforce non-discriminatory rules barring nonemployees from distributing union literature on its property. *Id.* at 112. But

when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property [is] required to yield to the extent needed to permit communication of information on the right to organize.

*Ibid.* Applying that test to the facts presented, the Court concluded that the nonemployee organizers were not entitled to access because there were no impediments to effective communication with employees through other channels. The Court emphasized that the employees were concentrated in a "small well-settled communit[y]" and could readily be reached, as the union's efforts had shown, through the mail, contacts on town streets, home visits, and telephone calls. *Id.* at 107 & n.1, 113-114.

In *Hudgens v. NLRB*, *supra*, the Court made clear that the balance between property rights and Section 7 rights may vary according to the circumstances. The Court stated that "[t]he locus of th[e] [*Babcock*] accommodation \* \* \* may fall at different points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522. *Hudgens* involved picketing by warehouse workers in support of an economic strike;

the picketing took place at the employer's retail outlet in a shopping center; and the property to which the employees sought access belonged, not to the primary employer, but to another party. *Ibid.* Overruling *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), which had required such shopping centers to permit access under First Amendment standards, the Court in *Hudgens* concluded that a claim of access "is dependent exclusively upon the National Labor Relations Act." 424 U.S. at 521.<sup>6</sup> Stating that the distinctions between the facts in *Hudgens* and the situation in *Babcock* "may or may not be relevant in striking the proper balance," the Court remanded to the Board for it to exercise "the primary responsibility for making this accommodation" in "each generic situation." 424 U.S. at 522.

Three principles follow from this Court's decisions in *Babcock* and *Hudgens*. First, in cases where nonemployees seek access to an employer's property, the Act does not authorize unnecessary intrusions on private property; the Board must determine that reasonable alternative means are not available to reach the employees.<sup>7</sup> Second, in making the accommoda-

---

<sup>6</sup> Earlier cases had narrowed the First Amendment principle of *Logan Valley* by holding that it did not apply to a union's claim of access to the parking lot of a single retail store, *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972), or to political handbilling that was unrelated to the purposes for which the shopping center property was used, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

<sup>7</sup> This proposition follows from both *Babcock* and the logic of the Act: if nonemployees have a reasonable alternative means to communicate with their target audience, an employer's nondiscriminatory denial of access does not violate Section 8(a)(1)'s prohibition against "interfer[ing] with, re-



tion between state-created property interests and Section 7 rights, the Board is empowered to weigh the variables that are typically found in such cases: the nature of the Section 7 right at stake, the nature of the property right, and the impairment of either right that would result from the denial or grant of access. Third, the task of particularizing the governing rules is entrusted to the Board, as the agency with responsibility for implementing national labor policy, subject to judicial review under conventional principles of deference.<sup>8</sup> *Babcock*, 351 U.S. at 111-112; *Hudgens*, 424 U.S. at 522-523.

2. Taking heed of *Babcock* and *Hudgens*, and in light of its experience in applying the Act, the Board developed a general approach to access cases in *Jean*

---

strain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights. See also *Jean Country*, 291 N.L.R.B. at 12 ("When individuals seeking to exercise Section 7 rights have reasonable means of exercising them without trespassing, precluding access to the private property in question does not threaten the destruction of the Section 7 rights.").

<sup>8</sup> The Board's explication of the Act is entitled to deference if it is "rational and consistent with the Act." *Litton Financial Printing Division v. NLRB*, No. 90-285 (June 13, 1991), slip op. 8, quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); see *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990). Contrary to petitioner's contention (Br. 39-47), "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy." *Ibid.*; *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975); cf. *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539, 1546 (1991) ("The question whether the Board has changed its view about certain issues or certain industries does not undermine the validity of a rule that is based on substantial evidence and supported by a 'reasoned analysis.'").

*Country*.<sup>9</sup> The Board's approach provides a framework for analyzing the "spectrum" of situations the Board encounters by requiring a careful analysis of the Section 7 right and property right at stake in each case; it also makes the issue of reasonable alternatives a crucial aspect of every decision. The process of analysis under *Jean Country* requires the Board to balance "the degree of impairment of the Section 7 right if access should be denied \* \* \* against the degree of impairment of the private property right if access should be granted." 291 N.L.R.B. at 14. In that balancing process, the "availability of reasonably effective alternative means" is "especially significant."<sup>10</sup> *Ibid.*

---

<sup>9</sup> The Board disapproved its decision in *Fairmont Hotel*, 282 N.L.R.B. 139 (1986), which had balanced the strength of the employees' Section 7 right against the strength of the property right involved, with the stronger right prevailing. Only if the rights were deemed relatively equal in strength would the existence of alternative means to exercise the Section 7 right "become [the] determinative" factor. *Id.* at 142.

<sup>10</sup> In *Jean Country*, the Board outlined specific factors that would generally guide its analysis. The degree of impairment of the property right depends on factors such as "the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's size and openness." The degree of impairment of the Section 7 right turns on both the importance of the right in the scheme of the Act and the extent to which it would be frustrated if access were denied. The reasonableness of alternative means of communicating the message is highly relevant to the impairment of Section 7 rights. "Factors that may be relevant to the assessment of alternative means include \* \* \* the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly,

Under *Jean Country*, the Board does not determine whether a particular alternative means of communication is "reasonable" in the abstract; rather, the Board considers it in relation to the impairment of rights that would result if access is granted or denied. The strength and nature of the conflicting "rights will 'inform the analysis of whether a union has reasonable alternative means to reach the targets of its section 7 activity.'" Pet. App. A16, quoting *Laborers Local Union No. 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir. 1990). For example, when allowing access will seriously impair the property right, the Board has refused to sanction access even where the Section 7 right is strong and the alternative forms of communication, although available, are limited and burdensome.<sup>11</sup> On the other hand, when

the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message." *Jean Country*, 291 N.L.R.B. at 13 (footnote omitted).

<sup>11</sup> For instance, in *Chugach Alaska Fisheries*, 295 N.L.R.B. No. 8 (June 15, 1989), the union sought access for organizational purposes to the nonwork areas of several canneries and to the bunkhouses and campsites owned by the canneries, where many of the employees lived during the short canning season. The Board denied the union access to the nonwork areas of the cannery itself because of the complicated processing operations going on in the facility, which caused public access to be tightly restricted. And, as to the segment of employees who lived in a nearby small town, the Board found that alternative means of communication were adequate because the union had the employees' names and addresses. Only as to bunkhouses and campsites on the employer's property did the Board require access, finding that the employer did not generally restrict access to those areas. Also instructive is *SCNO Barge Lines*, 287 N.L.R.B. 169 (1987), *aff'd sub nom. National Maritime Union v. NLRB*, 867 F.2d 767 (2d Cir. 1989), where the Board, applying *Fairmont* but considering

the degree of intrusion on private property is comparatively slight, such as where the property is generally open to the public, the Board has not relegated nonemployees to comparatively ineffective alternative means.<sup>12</sup> Similarly, the relative strength of the Sec-

alternative means because of the relatively equal competing rights, denied the union access to tow boats for organizational purposes and required contacts on shore, even though reaching the employees on shore was highly burdensome because of the employees' widely dispersed residences. In determining that those means were adequate, the Board noted the employer's strong interest in preventing access to its towboats; SCNO thus engaged in the type of balancing process that is now an explicit component of the Board's inquiry under *Jean Country*.

<sup>12</sup> The paradigm situation is where the employer has invited the public to come onto the property "without substantial limitation," as is the case with the common areas of stores clustered together in shopping strips, centers, or malls. See *Fairmont Hotel*, 282 N.L.R.B. at 141-142; *Scott Hudgens*, 230 N.L.R.B. 414, 417-418 (1977) (decision following remand from Supreme Court). In that setting, because the impairment to the property interest of granting access is usually minimal, the balance is more likely to tip in favor of access. Indeed, where access would only minimally intrude on property rights, the Board requires access even for Section 7 rights that are weaker than organizational rights, if the right at issue would be severely impaired without access. See *Sentry Markets*, 296 N.L.R.B. No. 5 (Aug. 10, 1989) (Board granted the union access to the parking lot and sidewalk in front of a food store in a multiple store shopping strip for the distribution of handbills urging customers not to purchase a struck product; the union's boycott message was a complex, "detailed" one that "could not be fully contained on \* \* \* picket signs" on the public property), enforced, 914 F.2d 113 (7th Cir. 1990); *Jean Country*, *supra* (Board granted union access to picket and handbill in a common area in front of a nonunion store in a large shopping mall when union's purpose was to encourage consumers to shop at other, unionized stores



tion 7 right at issue is considered in determining the extent to which exclusive use of alternative means of communication will compromise rights protected by the Act.<sup>13</sup>

3. Petitioner's principal contention (Pet. Br. 20) is that *Babcock* expresses a preference "to leave intact the usual private property rights, except where unusual circumstances require[] trespassing," such that the balance struck by the Board in each case "must be skewed in favor of private property rights." But the "guiding principle" of *Babcock* is the requirement that private property rights and Section 7 rights be accommodated with as little infringement of one as is compatible with protection of the other. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 548 (1972); *Hudgens*, 424 U.S. at 522 & n.12. Con-

in the mall; union activity at more remote locations would be ineffective and might discourage shoppers from patronizing any similar store at the mall).

<sup>13</sup> Accounting for the strength of the Section 7 right at issue assists in resolving the "anomaly" noted in *Giant Food Markets v. NLRB*, 633 F.2d 18, 24 (6th Cir. 1980): if access rulings are based on the presence or absence of alternative means without regard for the strength of the Section 7 right at issue, it "could result in allowing access for the exercise of core Section 7 rights, such as employee organizing, less readily than for less central rights, such as area standards activity." *Jean Country*, 291 N.L.R.B. at 12. "This is so because the intended audience of an organizing campaign—the employees of a particular employer—is more readily identifiable and thus more easily reachable away from the property than is the intended audience of area standards publicity"—customers of the employer or its products. *Ibid.* Weighing the right in question ensures that area standards picketing (for example) does not too easily override property rights; for the same reason, the Board does not let the union's definition of its intended audience control the analysis. *Id.* at 12-13.

trary to petitioner's view, *Babcock* did not announce a static test that applies mechanically in all settings. Rather, its accommodation principle, as explicated in *Hudgens*, requires a careful weighing of the interests implicated in particular settings where nonemployees claim a need for access. Cf. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492 (1978). If petitioner's across-the-board presumption in favor of property rights were accepted, the careful scheme of accommodation envisioned by *Babcock* would be upset. Indeed, it would require the subordination of core Section 7 rights to the property interests of employers even when the impairment of those property rights through temporary access would be no more than de minimis—as is the case here with respect to petitioner's parking lot.

Nor does *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), require the Board to tip the balance in favor of property rights, as petitioner argues. See Pet. Br. 18, 20, 39, 47. *Sears* presented a preemption issue: whether the Act preempts a state trespass action against a union that is picketing on an employer's property. The Court held that when the union has not filed an unfair labor practice charge—and the employer thus has no means of obtaining the Board's decision whether the picketing is protected by the Act—the state court action may proceed.<sup>14</sup> Petitioner reads far too much into the statement in *Sears* that "experience under the

<sup>14</sup> The state court, however, must determine whether the trespass in question is protected by Section 7. 436 U.S. at 201 ("Prior to granting any relief from the Union's continuing trespass, the state court was obligated to decide that the trespass was not actually protected by federal law.").



Act teaches" that "a trespass is far more likely to be unprotected than protected," and that the employer's right to exclude "remains the general rule." 436 U.S. at 205. The Court's observation reflected a description of then-existing case law, not of any particular mode of analysis applied by the Board.<sup>15</sup> The Court acknowledged that the proper accommodation of rights takes into account the strength of the Section 7 right and the property right being asserted, see 436 U.S. at 204 (citing *Hudgens*), and specifically noted that organizational rights lying "at the very core" of the Act would presumably get greater deference "in the *Babcock* accommodation analysis" than more peripheral Section 7 rights. 436 U.S. at 206 & n.42. In sum, *Sears* did not change the Board's mission under *Babcock* and *Hudgens* to accommodate the two competing rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112.

**B. The Approach Set Out In *Jean Country* Reasonably Fulfills The Board's Charge To Accommodate Competing Interests**

Apart from its broad submission that *Jean Country* undervalues property rights, petitioner also challenges the elements of the *Jean Country* analysis, contending that the Board errs in the way it analyzes the char-

<sup>15</sup> Moreover, the law in this area was not particularly well developed at that time. As Justice Blackmun noted in his concurrence, "for a number of years, the First Amendment holding of *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), overruled in *Hudgens v. NLRB*, diverted the Board from any need to consider trespassory picketing under the statutory test of *Babcock*." Accordingly, he stated, "it would be unwise to hold the Board confined to its earliest experience in administering the test." *Sears*, 436 U.S. at 211.

acter of the rights implicated in a particular case, and in evaluating the adequacy of alternative means. Those contentions are not well founded.

1. *The adequacy of alternative means cannot be analyzed in isolation from other factors.* Petitioner and its amici argue that the Board must, as a threshold matter, determine whether the union has some alternative means to trespassory communication; only if the intended audience is "inaccessible to normal means of contact" may the Board look to the importance of the rights at issue. Pet. Br. 47; Amici Chamber of Commerce, *et al.*, Br. 9-12.<sup>16</sup> That suggestion is flawed. The *Jean Country* approach recognizes, of course, that when access is unnecessary to provide a reasonable means of reaching the union's target audience, the union's request may be denied. Indeed, access may be denied even where the impairment of property rights is slight and the use of the employer's property would make the union's communication marginally more effective.<sup>17</sup> But a

<sup>16</sup> Citing the Court's statement in *Babcock* that an employer does not have to "permit the use of its facilities for organization when other means are readily available," 351 U.S. at 114 (emphasis added), the Chamber asserts that "[a]bsent proof that other means are nonexistent, the Board's inquiry is terminated." Amici Br. 10 (emphasis added). But the Court's description—means that are not "readily available"—is not synonymous with the Chamber's—means that are "nonexistent." If the Chamber's extreme position were accepted, an employer could routinely defeat a claim to access by asserting that a "usual" means of communication was theoretically available, no matter how inadequate that means might be for the enjoyment of Section 7 rights in a particular setting.

<sup>17</sup> For instance, in *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), slip op. 6-7, *aff'd sub nom. Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990), the union sought access to the parking lots of three of the

rigid direction to rate the adequacy of alternative means without regard to the particular property right and Section 7 right ignores the Board's obligation to balance the relative harms. *Babcock*, 351 U.S. at 112. To achieve an accommodation of rights that does not harm either right more than necessary, the Board must examine the alternatives to trespassory communication in context. For example, if a particular alternative means is so burdensome or expensive that it is unlikely to be employed to "reach" the target audience with the union's message, Section 7 rights will plainly suffer. The Board must then decide *how much* those rights should suffer before an employer will have "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. 158(a)(1). It cannot make that judgment without considering the importance of the right to the purposes of the Act.

The adequacy of mass media as an alternative to access illustrates the point. As the Board stated in *Jean Country*, "generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact."

---

employer's restaurants to handbill about its area standards dispute with a contractor doing construction work for the employer at a fourth restaurant. Slip op. 2, 4. Noting that the union had access to an area in which it could effectively handbill at the fourth restaurant, the Board found that the union had "reasonable means of exercising Section 7 rights on behalf of employees whose wage standards the [contractor] allegedly was undermining" and, thus, it was unnecessary to grant the union access to the parking lots of the other three restaurants. Slip op. 5-6. Accord *Richway Div. of Federated Dep't Stores*, 294 N.L.R.B. No. 49 (May 31, 1989).

291 N.L.R.B. at 13.<sup>18</sup> The court of appeals explained why those means are usually deficient: it is "unrealistic to divorce considerations of cost from the calculus of alternative means." Pet. App. A20. For example, in an organizing campaign, a union could theoretically buy television, radio, or newspaper advertisements sufficient "to saturate a market and thus convey its \* \* \* message," but in the typical case it is "unreasonable to expect the union to embrace this extreme." *Ibid.* Mass media advertising "is expensive and, when addressed to a work force which comprises a tiny fraction of the viewing audience, extravagantly wasteful." *Ibid.* See *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967); *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963), cert. denied, 376 U.S. 951 (1964). On the other hand, if a union is aiming its message at consumers of a widely used and readily identifiable product to publicize its dispute with the manufacturer and to urge a boycott, mass media advertising, even though expensive, may sometimes be an appropriate alternative to access. See *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62 (Aug. 31, 1989); cf. *Sentry Markets*, 296 N.L.R.B. No. 5 (Aug. 10, 1989) (alternative means were not effective where product was not readily identifiable), enforced, 914 F.2d 113 (7th Cir. 1990). Accordingly, the Board's consideration of the right in question as it bears on the reasonableness of a particular alternative is a sensible way to further the accommodation required by *Babcock*.

---

<sup>18</sup> Nothing in *Babcock* requires the use of mass media; the alternative means of communication discussed in that case were "personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." 351 U.S. at 111; *id.* at 107 n.1.



2. *The openness of the property is a relevant consideration.* Petitioner also contends (Pet. Br. 21-22; see also Amicus International Council of Shopping Centers, Inc., Br. 5-10) that under *Jean Country* the Board improperly calibrates property rights by allowing an owner's invitation to the public to transact business on its property to dilute its right to exclude. But it is entirely rational for the Board to find that the impairment of a property right is far more significant where the employer must grant access to a fenced, privately maintained location from which the public is excluded (the *Babcock* situation), as opposed to an open parking lot where the public is invited, and encouraged, to come (the situation here). Barring the general public by putting up a fence generally signals that security concerns or the particular demands of the business require a heightened level of exclusivity, and that access by outsiders may impair the employer's objectives. In contrast, an employer that opens its property to the public manifests less concern that the presence of outsiders would impair the normal use of the property.

By considering the uses to which an employer's property is already put, the Board is able to evaluate the "incremental intrusion"<sup>19</sup> that access would have on the property right. See *Montgomery Ward & Co. v. NLRB*, 728 F.2d 389, 391 (6th Cir. 1984) (per curiam) (union officials were entitled to access to a snack bar to solicit employees where the activity was "consistent with" and an "incident to" the "normal use of [the] facilities"). As a practical matter,

<sup>19</sup> Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 575 (1978) (considering that factor in upholding employees' distribution of contested portions of a union newsletter on employer's property).

the impairment is modest when union agents enter a large parking lot in a shopping center for a limited time and purpose. The interference with property interests is particularly attenuated given the Board's customary restriction that access not impede the normal use of the property.<sup>20</sup>

Contrary to the suggestion of petitioner (Pet. Br. 22) and Amici Chamber of Commerce, *et al.* (Br. 14-15), the Board's consideration of the character of the property does not resurrect the discredited First Amendment analysis of *Logan Valley*, which this Court overruled in *Hudgens*. See note 6, *supra*. Although *Hudgens* makes clear that a shopping center's openness to the public does not mean that it is public property for purposes of the First Amendment, nothing in *Hudgens* suggests that the openness of the property is irrelevant in the statutory analysis under the Act. Indeed, in inviting the Board to consider the character and strength of both property rights and Section 7 rights, 424 U.S. at 521-522, the Court necessarily contemplated that the Board would consider factors that diminished the force of the employer's reliance on its property interests. And Amici Chamber of Commerce, *et al.* are far from the mark in suggesting (Br. 15 & n.17) that compelled access to an employer's property implicates First Amendment and due process concerns, so that the Act should be construed to allow access "only in truly exceptional circumstances" in order to avoid a serious constitutional question. The constitution-

<sup>20</sup> Here, for example, the Board's order authorized access to petitioner's parking lot "as long as the [distribution of union literature] is conducted by a reasonable number of persons, and does not unduly interfere with the normal use of the parking lot, or the traffic flow from the Berlin Turnpike." Pet. App. B27.



ality of the Board's practice here is settled under *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where this Court rejected a First and Fifth Amendment challenge to a state requirement that a shopping center allow access to individuals for the purpose of exercising free speech rights.

3. *The Board does not require that the alternative means be persuasive to employees.* Petitioner also contends (Pet. Br. 21, 23-25) that Jean Country misapplies the alternative-means requirement of *Babcock* by focusing on the union's success in using nontrespassory alternatives rather than on whether the union can "reach" its intended audience with those alternatives. But the Board does not base its access determinations on whether the employees are receptive to the union's message; rather, the Board focuses on whether there is a reasonable means for the union to convey its message in a way the target audience can understand. In context, the statement in *Jean Country*, 291 N.L.R.B. at 13, that the Board would consider the extent to which "exclusive use of non-trespassory alternatives would dilute the effectiveness of the message" does not imply, as petitioner suggests, that the Board looks to the persuasiveness of the message. Rather, the statement merely reflects the truism that communications that are unlikely to be heard or understood by a large part of the intended audience are necessarily diluted in their effectiveness.

The Board's approach is also consistent with *Babcock*, which requires the Board to consider not only whether alternative means are available, but also whether they are "ineffective." 351 U.S. at 112-113. The Board has recognized that alternative means must be used even if they are not as effective as access: as petitioner and its amici note (Pet. Br. 21-22; Chamber

of Commerce, *et al.*, Br. 13), *Babcock* rejected the contention that union organizers must have access to property because the workplace is "so much more effective" a place for communication than alternatives such as personal contacts on public property or in the employees' homes, telephone calls, letters, or meetings. 351 U.S. at 107-108, 111. See *Hardee's Food Systems, Inc.*, 294 N.L.R.B. No. 48 (May 31, 1989), slip op. 6. But that does not mean that the Board must totally disregard the effectiveness of the available alternatives.

4. *The Board's approach provides sufficient predictability.* Finally, petitioner contends (Pet. Br. 13, 19-20; see Amici Chamber of Commerce, *et al.*, Br. 20-22) that the Board's use of a balancing test in which neither right has presumptive primacy creates an "unpredictable" situation in which property owners have no real sense of when access may be denied and when it must be granted. Although any balancing test will lack the predictability of a bright-line rule, the Court concluded in *Babcock* and *Hudgens* that the importance of the two rights in question—and the need to prevent unnecessary damage to either—made a careful balancing analysis essential. And, as experience under the *Jean Country* approach develops, recurring "patterns will become more clear," *Jean Country*, 291 N.L.R.B. at 14, making it possible for the parties to discern when access would likely be permitted in "each generic situation." *Hudgens*, 424 U.S. at 522. Indeed, the outline of these patterns is beginning to emerge in the Board's cases. See notes 11-13, *supra*.<sup>21</sup>

<sup>21</sup> As the process of case-by-case adjudication continues, it will also become easier for the Board's General Counsel expeditiously to determine whether a charge of denial of access

Ironically, petitioner also complains about the emergence of patterns (Pet. Br. 34-35 & n.9); it asserts that, because the Board has denied access to property in relatively few cases since *Jean Country*, the Board must be failing "to give sufficient deference to property rights, or \* \* \* to require a true showing of the necessity for trespass."<sup>22</sup> But the majority of the cases in which the Board has granted access involve a generic situation similar to that found here—access to retail property that is generally open to the public, where the Section 7 right would be substantially impaired if access to the property were denied.<sup>23</sup> There is no flaw in an administrative process that reaches consistent results on comparable records.

---

lacks merit and should be dismissed. Accordingly, contrary to the contention of amici (Chamber of Commerce, *et al.*, Br. 2-22 & n.23), the use of the *Jean Country* balancing test does not mean that every charge will have to be subjected to a fact-specific hearing while employers are required to tolerate unwelcome trespasses.

<sup>22</sup> In noting a trend in favor of access, petitioner overlooks the fact that, as this Court observed in *Sears*, 436 U.S. at 206-207, unions may invoke the Board's jurisdiction when their access claim is strong, but avoid it when their access claim is weak. Weak cases are also weeded out by the General Counsel, who has "unreviewable discretion" not to file a complaint on a union's charge, see *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 126 (1987).

<sup>23</sup> See, e.g., cases cited in note 12, *supra*. In three other cases, the Board required contractors to grant access to union representatives to handle grievances involving a subcontractor's employees, where the subcontractor had a union-access clause in its collective-bargaining agreement with the union. See *C.E. Wylie Construction Co.*, 295 N.L.R.B. No. 119 (July 31, 1989), enforced, No. 90-70033 (9th Cir. June 3, 1991); *Mayer Group*, 296 N.L.R.B. No. 9 (Aug. 9, 1989); *Subbiondo & Associates*, 295 N.L.R.B. No. 132 (July 31, 1989). In the

### C. The Board Properly Determined That The Union Must Be Allowed Access To Petitioner's Parking Lot

The Board's application of the *Jean Country* analysis in this case fully accords with this Court's decisions and the policy of the Act. Petitioner errs in contending (Pet. Br. 23-38) that *Jean Country* in general and this case in particular reflect an improper reduction in the General Counsel's burden to establish the need for access to property.

1. *The Union's handbilling was in furtherance of a core Section 7 right.* The Union sought to distribute handbills to petitioner's employees in furtherance of an organizing effort. The handbills described the benefits offered by the Union, and included authorization cards to facilitate the expression of interest by employees in being represented by the Union. Petitioner's denial of access therefore implicates the organizational rights of its employees, which are at the "very core" of the interests the National Labor Relations Act seeks to protect. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). As this Court has held, an essential derivative of the right of employees to engage effectively in self-organization is the right to receive information from union organizers, because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542

---

two cases that involved access for union organizers to residential, nonwork areas of remote industrial facilities, access was granted in one, *Trident Seafoods Corp.*, 293 N.L.R.B. No. 125 (May 12, 1989), and access was granted in part in the other, *Chugach Alaska Fisheries*, 295 N.L.R.B. No. 8 (June 15, 1989).



(1972). Nothing about the situs or manner of the Union's handbilling diminished the strength of this statutory right; the Union's handbilling was unobtrusive and was compatible with the parking lot's normal use.<sup>24</sup> Pet. App. B4, B6.

2. *Petitioner's parking lot was open to the public and the handbilling did not impair its normal use.* Petitioner's parking lot is not a private space from which nonemployees are normally excluded; no restrictions are posted at the entrances to the Plaza or in the parking lot itself. Rather, the parking lot is open and freely accessible to the public from public streets. Nor is the lot reserved for petitioner's exclusive use. Both the lot and its principal entrances are likely to be used "by patrons and employees of all the stores" in the Plaza, ~~or~~ by persons using the public pay telephones. Pet. App. A2-A3, B3, B11-B12. The Store was located in a plaza presumably to take advantage of cross-over shopping—a phenomenon that occurs when customers come to shop at one store, but impulsively decide to shop at a different store. See *Scott Hudgens*, 230 N.L.R.B. 414, 417-418 (1977) (cross-over shopping is "explicitly recognized" in the design of multistore shopping areas). Thus, it was integral to petitioner's plan for the parking lot that it be essentially open to the public.

<sup>24</sup> Making liberal reference to matters that were excluded from evidence, petitioner argues (Br. 11-12, 35-38) that the Union's entry into the Store itself was an abusive practice that undermines the Section 7 right asserted in this case. Cf. *NLRB v. City Disposal System, Inc.*, 465 U.S. 822, 837 (1984). But as the court of appeals concluded, the Board reasonably rejected petitioner's offer of proof on that subject on relevancy grounds. Pet. App. A15 n.8, B4 n.7. Assuming, as petitioner contends, that Union representatives had no right to enter the inside of the Store, the circumstance is irrelevant to petitioner's refusal to permit unobtrusive access to the parking lot.

Petitioner did enforce a policy against soliciting and distributing literature on its property, presumably to avoid disturbances to its customers or potential liability. See J.A. 70, 89-90. But as the court of appeals pointed out, the Board found that the "planned organizational activity did not interfere with normal use of the [parking lot], disrupt Lechmere's business, constitute harassment, or impede traffic flow." Pet. App. A15, B4. In light of that finding, petitioner never explains what concrete impairment of its property interest is implicated here that trumps the organizational rights protected by federal law.<sup>25</sup> Accordingly, temporary access by Union personnel would not impair in any significant way the uses and purposes to which petitioner put its property.<sup>26</sup>

3. *Handbilling on the parking lot was the only reasonable means for the union to reach petitioner's employees with its organizational message.* Finally, the

<sup>25</sup> Petitioner's reliance on its property rights to exclude Union organizers serves to impede the Union's communications with the employees about organizational rights, but if that is petitioner's purpose, cf. J.A. 91, 95 (petitioner preferred that its employees not be represented by a union), it is not a legitimate objective under the Act. See 29 U.S.C. 151 (declaring that it is the policy of the United States to "encourag[e] the practice and procedure of collective bargaining and [to] \* \* \* protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing").

<sup>26</sup> Because the Board found that access would not interfere with petitioner's business, petitioner is wrong in contending (Pet. Br. 47) that the decision here is inconsistent with *Tecumseh Foodland*, 294 N.L.R.B. No. 37 (May 31, 1989) (access denied where number and placement of the union's handbillers on narrow walk in front of the store was "obtrusive" and would obstruct entry and exit from the employer's premises).



Board reasonably concluded that the General Counsel met his burden of proving that "there was no reasonable, effective alternative" means of communication to the distribution of handbills on the Plaza parking lot. Pet. App. B4.

a. Under *Babcock*, the General Counsel has the burden to show that, in the absence of access, there are no reasonable means of communicating the union's message to the employees. 351 U.S. at 113; *Sears*, 436 U.S. at 205. Petitioner contends (Br. 25-31) that because *Babcock* imposes the burden of proof on the General Counsel, the Board may not rely on presumptions or inferences in finding that a given alternative is unreasonable. Instead, petitioner argues, the Board must insist that the General Counsel show that the union tried and failed to communicate with employees through the proffered alternative.

The decision in *Babcock* does not question the authority of the Board, like any administrative agency, to draw reasonable inferences from the evidentiary facts, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945), or to formulate generally applicable inferences or presumptions based on its "[c]umulative experience." See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Nor need the union waste its time and money to engage in pro forma efforts to communicate through plainly inadequate means. Where the Board finds it clear from experience that a given alternative is not effective, it can so rule. On the other hand, "[i]n some contexts, the attempt must in fact have been made to support an objective conclusion that an asserted alternative is not reasonable." *Jean Country*, 291 N.L.R.B. at 13. A universal requirement that the alternative must be tried would "create[]" unnecessary "delay and additional expense for the union" and would "force[]" the union to un-

dertake futile efforts in order to secure a favorable Board determination." *Husky Oil, N.P.R. Operations, Inc. v. NLRB*, 669 F.2d 643, 645 (10th Cir. 1982); *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 91 (5th Cir. 1980); *National Maritime Union v. NLRB*, 867 F.2d 767, 771 (2d Cir. 1989).

b. The Board reasonably concluded that a newspaper or other mass media campaign was not a reasonable way for the Union to reach petitioner's 200 Newington store employees. As noted (pp. 26-27, *supra*), the Board considers newspapers or other mass media to be, as a general matter, too costly and indirect to serve as an effective substitute for face-to-face contacts. The Board is entitled to deference with respect to that presumption, which is based on its experience in labor cases. See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953). Nothing in this case required the Board to depart from it.<sup>27</sup>

As the Board found, a mass media campaign would have been a particularly inefficient and costly method for the Union to disseminate its organizational message. Pet. App. A20. First, newspapers are not an effective way to reach 200 employees in a metropolitan area of about 900,000 people; it is a hit-or-miss proposition whether any employees subscribe to

---

<sup>27</sup> Petitioner's reliance (Pet. Br. 30, 46) on *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62 (Aug. 31, 1989), is misplaced. There, the Board found that the union's use of 160 brief advertising spots on local television and radio, together with consumer "picketing and handbilling at the perimeters of the stores," constituted reasonably effective alternative means for conveying the union's area standards message. Here, by contrast, the audience was not the buying public as a whole, but a small group of employees who might never receive a mass media message and who could not be reached from nearby public property.

the local newspaper,<sup>28</sup> or whether they would see the Union's advertisement.<sup>29</sup> *Id.* at B5 ("A newspaper's general circulation \* \* \* is not evidence of receipt of a discrete message intended for a specific audience \* \* \* of \* \* employees [who] may never receive, purchase, or read the[] local newspapers, or may be exposed to them only occasionally."). Second, advertising on media such as television and radio is too limited in content; the typical television "sound bite," for example, could not provide employees with the basis for making an informed choice about whether to join a union. Cf. *NLRB v. United Aircraft Corp.*, 324 F.2d at 130. Third, an organizing campaign is particularly dependent on personal conversations in which employees can raise questions and be encouraged to overcome any concerns they might harbor about management's possible disapproval of union activity. Mass media advertising is not an adequate

<sup>28</sup> Petitioner contends (Pet. Br. 29-30) that because the Union ran some advertisements, it must have viewed them as an effective alternative means. But that argument comes with poor grace from petitioner, which succeeded in excluding, as irrelevant, testimony at the administrative hearing from a union agent about the Union's basis for concluding that media advertising was an ineffective means of communicating its organizational message (Tr. 120). In any event, the Union's conduct may be explained by the fact that when the advertisements were run, the rule in the Second Circuit (where the instant case arose) seemed to be that "to sustain its burden of proving lack of alternative means [in access-to-property cases], a union [had to] demonstrate that it unsuccessfully attempted to utilize other means." *National Maritime Union v. NLRB*, 867 F.2d 767, 771 n.3 (2d Cir. 1989).

<sup>29</sup> Petitioner's practice of removing the advertisements from the newspapers delivered to the store, Pet. App. B5 n.9, also vitiated the effectiveness of that medium of communication.

substitute for such contact. *Husky Oil*, 669 F.2d at 646.

c. The Board also concluded that even with "diligence and perseverance," the Union would not be able to compile a comprehensive list of the names and addresses of petitioner's employees, and thereby meet with them face-to-face away from the workplace. Pet. App. B5. For several months, union representatives regularly went to public property abutting the Plaza between 9 and 10 a.m. to copy the license numbers of cars parked where petitioner's employees were encouraged to park, and took the license numbers to the Motor Vehicle Registry, which supplied the names and addresses of the cars' registered owners. Nonetheless, the Union secured the names and addresses of only one-fifth of petitioner's employees. Pet. App. B5 & n.10, B18-B19; J.A. 37-43. Those modest results are hardly surprising, given that "[e]mployees may use cars that are not registered in their names, may car pool together, may use alternative means of transportation, \* \* \* may park elsewhere [or may be] part-time employees [who] might not use the parking lot at those times shortly before and after the [S]tore's designated opening hours." Pet. App. B5-B6. The obvious inefficiency of that process contributed to the Board's finding that copying license plate numbers was not an effective source of names and addresses of petitioner's employees. *Id.* at B6.

Even as to those few employees whose names and addresses the Union was able to obtain, face-to-face contact was difficult to arrange. The Union secured the names and addresses of 41 employees, but nearly half of those individuals had unlisted telephone numbers. The Union therefore had no way to request even a brief meeting with them. Moreover, the Union



was able to make a completed phone call to only 10 of the 20 employees for whom it had a telephone number, and in eight of those 10 instances, the Union agent was rebuffed by a teenage employee's parent, who refused to allow the teenager to speak with a union organizer. Pet. App. A6, B5 & n.10; J.A. 46-47. On the whole, the collection of license plate numbers did not give the Union a "meaningful opportunit[y] for face-to-face contact" with the vast majority of the Store's 200 employees.<sup>30</sup> Pet. App. A18-A19. See *National Maritime Union v. NLRB*, 867 F.2d at 773; *John Bancroft & Sons*, 140 N.L.R.B. 1288, 1291 (1963).

d. The Board was also justified in finding that the remaining alternative means of communication for the Union—to position its agents on the strip of public property abutting the Turnpike in an attempt to distribute handbills to employees as they arrived for work in their cars—"offer[red] an ineffective and unsafe locale for [such] union activity." Pet. App. B6; see *id.* at A18 & n.11. Union agents were specifically warned by the police that the grassy strip was not a safe place to stand because of the flow of traffic entering the parking lot from the Berlin Turnpike. Moreover, the lack of a traffic signal or stop sign at the main entrance not only created a safety hazard for the union organizers, but also invited accidents if the organizers tried to approach moving cars to give the occupants handbills. See *W.S. Butterfield*, 292 N.L.R.B. No. 8 (Dec. 20, 1988), slip op. 7, 10-12 & n.10. Handbilling from the grassy strip did

<sup>30</sup> The relative ease with which the union secured such contacts with employees in the small community setting involved in *Babcock* stands in marked contrast. In that setting, it was feasible to visit at home, on the streets, and through phone calls. See 351 U.S. at 107 n.1, 113.

not constitute a reasonable alternative means of communicating the Union's message to petitioner's employees.<sup>31</sup>

e. Because advertising, home contacts, and handbilling from a public area adjacent to the parking lot could not provide the Union with "reasonably effective" means of communicating with petitioner's employees about self-organization, the Board reasonably concluded that "the Union's Section 7 right would be 'severely impaired—substantially "destroyed" within the meaning of *Babcock & Wilcox*' without entry onto [petitioner's] property." Pet. App. B6. In view of the relatively slight impairment of petitioner's property right that would result from granting access, *ibid.*, the Board properly found that petitioner's denial of access "interfere[d] with, restrain[ed], or coerce[d] employees" in violation of Section 8(a)(1) of the Act.

\* \* \* \*

The Board's *Jean Country* test is consistent with both the requirements of the Act and the holding of *NLRB v. Babcock & Wilcox Co.* It properly channels the Board's task of reconciling the tension between property rights and Section 7 rights. As applied in this case, the Board has fulfilled its mandate to ensure that neither right is impaired more than necessary.

<sup>31</sup> Petitioner speculates (Br. 24-25, 26) that the Union could have positioned its agents on the public portion of the grassy strip near the parking lot. But the four feet of the strip nearest the perimeter of the parking lot belonged to petitioner. Therefore, Union agents would have had to shout over traffic, and at some distance, to communicate with employees who parked closest to the strip.



**CONCLUSION**

The judgment of the court of appeals should be affirmed.

**KENNETH W. STARR**  
*Solicitor General*

**CHRISTOPHER J. WRIGHT**  
*Acting Deputy Solicitor General*

**MICHAEL R. DREEBEN**  
*Assistant to the Solicitor General*

**JERRY M. HUNTER**  
*General Counsel*

**D. RANDALL FRYE**  
*Acting Deputy General Counsel*

**NORTON J. COME**  
*Deputy Associate General Counsel*

**LINDA SHER**  
*Assistant General Counsel*

**LAURENCE S. ZAKSON**  
*Attorney*  
*National Labor Relations Board*

**JUNE 1991**

15  
No. 90-970

Supreme Court, U.S.  
FILED

AUG 12 1991

OFFICE OF THE CLERK

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

**REPLY BRIEF**

ROBERT P. JOY  
*Counsel of Record*

KEITH H. McCOWN

BENJAMIN SMITH

MORGAN, BROWN & JOY

One Boston Place

Boston, MA 02108

(617) 523-6666

*Counsel for Petitioner,  
Lechmere, Inc.*

## TABLE OF CONTENTS

	Page
I. The Authority for Lechmere's Assertion that Private Property Rights are Entitled to Deference is the Supreme Court's <i>Babcock &amp; Wilcox</i> Decision Itself .	3
II. The Board's Repeated Measurement of the Degree of Harm Done to Lechmere's Property Interest is Irrelevant to the Question of Whether Access is Necessary for the Protection of Employees' Section 7 Rights.....	4

## TABLE OF AUTHORITIES

### Cases:

<i>Babcock and Wilcox Co.</i> , 109 N.L.R.B. 485, 34 L.R.R.M. (BNA) 1373 (1954).....	5
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) ...	6
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	6
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	4
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) ..	3, 4
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987) .....	5



**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. 90-970

---

LECHMERE, INC.,  
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT.

---

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

REPLY BRIEF

---

Petitioner Lechmere, Inc. ("Lechmere") respectfully submits this reply to the brief filed on behalf of respondent National Labor Relations Board ("NLRB" or the "Board") in opposition to Lechmere's brief on the merits.

This reply addresses two of the Board's central themes. First, the Board contends that *Babcock & Wilcox* permits balancing of employees' Section 7 rights against property owners' right to deny access to union organizers, as if these two rights were in equipoise. Resp. Br. 22-24. *Babcock & Wilcox*, however, was a mandate that a property owner's right to exclude be jealously guarded; it is a right that can be compromised only after the General Counsel has met the exacting threshold

of proving that access was necessary to protect employees' Section 7 right to be reached by union organizers.<sup>1</sup>

Second, the Board repeatedly expounds that because its sanctioned intrusion on Lechmere's property would be "incremental" or "de minimis", then regardless of whether the General Counsel has met the threshold showing of necessity, Lechmere committed an unfair labor practice under the Act by excluding an incremental trespasser from its property. Resp. Br. 28-30, 34-35. Yet, the degree of intrusion, or the hardship suffered by the property owner, is a red herring that plays no role in the initial inquiry that the Court decreed in *Babcock & Wilcox*.

Lechmere submits that this entire controversy could be reduced to two fundamental questions: First, is access to private property necessary to gain access to employees? This essentially is the reasonable alternative means analysis. Second, if there are no reasonable alternative means by which the union agents reached or could have reached Lechmere's employees, then how much access should be granted? The *Jean Country* analysis followed by the Board and the First Circuit in *Lechmere, Inc.* commingles factors that may be relevant in determining unfair labor practice liability with factors whose only relevance would be in determining an appropriate remedy upon the Board's finding that the exclusion of trespassers violated the Act. This commingling has created a presumption in favor of access that is untrue to *Babcock & Wilcox*. Pet. Br. 34-35 & n.9. Lechmere is one of many casualties of the Board's infidelity to the Court's directive.

<sup>1</sup> As noted in Lechmere's brief on the merits, the Union does not have a direct Section 7 right to communicate with employees. Pet. Br. 3. That the Board in *Lechmere, Inc.* sought to defend "the Union's Section 7 right" may be an indication that the Board needs to view access cases in a manner more faithful to *Babcock & Wilcox*. Pet. App. B-6.

# I. THE AUTHORITY FOR LECHMERE'S ASSERTION THAT PRIVATE PROPERTY RIGHTS ARE ENTITLED TO DEFERENCE IS THE SUPREME COURT'S *Babcock & Wilcox* DECISION ITSELF.

The Board argues that *Babcock & Wilcox* did not express a preference to leave intact private property rights, and that an "across-the-board presumption" in their favor would upset the careful scheme envisioned by the Court. Resp. Br. 22-23. However, the Board's present version of the "careful scheme of accommodation envisioned by *Babcock*" is revisionist. See Resp. Br. 23. The logic of *Babcock & Wilcox* so dictates.

Under the *Babcock & Wilcox* analysis only *property rights* are ever actually at risk. Section 7 rights, by contrast, will always be protected. The "reasonable alternative means" factor assures this result. If the Board makes a proper determination of whether there are reasonable alternative means by which the union has reached or could have reached employees, then those employees will never be denied their Section 7 rights. Contrarily, the Board's proper application of *Babcock & Wilcox* could result in a property owner's being denied the right to exclude.

Under *Babcock & Wilcox* it is thus impermissible to deny employees their Section 7 rights, but it may be permissible for the Board to order that property owners yield a right protected by the "National Government." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Because only property rights are at risk, they are entitled to a presumed sanctity that may only be overcome upon the General Counsel's making a strict showing of necessity. Stated another way, if property rights are upheld it will only be because employees' Section 7 rights are not at risk.

This interpretation is entirely consistent with the Court's statements that accommodation of the two rights shall be accomplished "with as little destruction of one as is consistent with the maintenance of the other", and that "[t]he locus of that accommodation may fall at differing points along the

spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." See *Babcock & Wilcox*, 351 U.S. at 112-13; *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). The entire context of *Babcock & Wilcox* requires that the foregoing be interpreted only one way, to require "as little destruction of [property rights] as is consistent with the maintenance of [Section 7 rights]".

But in addition, what the Board has done in *Fairmont Hotel*, *Jean Country*, and *Lechmere, Inc.* is to jumble the very separate questions of liability and remedy. The above-quoted passages must be read to refer largely to the remedy phase of the unfair labor practice case. Lechmere asserts that accommodation of rights is a remedy, which the Board shall not provide unless and until the General Counsel has satisfied his threshold burden of proving that absent trespass, the employees' Section 7 rights will be denied.

## II. THE BOARD'S REPEATED MEASUREMENT OF THE DEGREE OF HARM DONE TO LECHMERE'S PROPERTY INTEREST IS IRRELEVANT TO THE QUESTION OF WHETHER ACCESS IS NECESSARY FOR THE PROTECTION OF EMPLOYEES' SECTION 7 RIGHTS.

Both the First Circuit and the Board in *Lechmere, Inc.* concluded that granting Union organizers access onto Lechmere's parking lot would be "minimally disruptive", and would not be a "substantial" impairment of its property interest. Pet. App. A-21, B-6. The Board has now emphasized this characterization by quantifying the infringement as "incremental", "not substantial", "comparatively slight", "minimal", and "de minimis". Resp. Br. 13, 20, 23.<sup>2</sup> Measuring the degree of

<sup>2</sup> The Board argues that "when the degree of intrusion on private property is comparatively slight, such as where the property is open to the general public, the Board has not relegated nonemployees to *comparatively ineffective alternative means*." Resp. Br. 21 (emphasis added). Comparing the effectiveness of the alternative means is not rooted in *Babcock & Wilcox*, which requires only that employees be reached, not that they be convinced. Pet. Br. 23-25.

impairment of the property owner's interests does not go to the "nature and strength" of Lechmere's property rights, but rather is used in this case to belittle Lechmere's arguments and to rationalize the Board's ordering an unnecessary trespass. In essence, the Board is making an arbitrary determination of the hardship suffered by the property owner, and using that hardship to support its argument that employees have not been reached.

It serves no purpose to quantify the injury to the employer's property interest because the interest at issue is the right to exclude, which is either taken completely or not at all. Pet. Br. 3 n.3 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)). The notion of an "incremental" or "comparatively slight" infringement on the right to exclude soon becomes irrational. After all, there was no intrusion of any great weight when union organizers peacefully posted themselves in a large employee parking lot at the Babcock & Wilcox plant. *Babcock and Wilcox Co.*, 109 N.L.R.B. 485, 490, 34 L.R.R.M. (BNA) 1373 (1954). Indeed, an argument can be made that this would be *less* intrusive to an employer's property rights because, unlike a retail store setting, there is no potential annoyance to customers or third parties. Nevertheless the Supreme Court upheld the employer's right to exclude.

Nor does measuring the degree of impairment resolve the question of unfair labor practice liability, in which the focus of the inquiry is on reasonable alternative means; or remedy, where the focus shifts to determining what access will be necessary for union organizers to reach employees. That the Board repeatedly makes reference to such an irrelevant factor underscores how far its approach has strayed from the underlying question of whether union organizers can reach employees absent access.

The nature and strength of the respective Section 7 and private property rights are essential to resolving the question of union access to private property. As the foregoing demonstrates, however, not all factors that the Board evaluates under



the guise of "nature and strength" are relevant to the question of access.

Furthermore, even those factors that are relevant to the question of access are not applied in a thoughtful manner. As set forth in Lechmere's brief on the merits, *Jean Country* has caused *Babcock & Wilcox* to devolve into an unwarranted diminution of the right to *exclude* simply because an employer exercises its coexisting and equally secure right to *invite* patrons for the purpose of transacting business. Pet. Br. 21; *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting). The Board states that the "openness of the property is a relevant consideration" because there is "less concern that the presence of outsiders would impair the normal use of the property" and that the employer's reliance on its property interest now has "diminished force." Resp. Br. 28, 29. The fact that the Lechmere store is open to the public may be significant, not because it evidences a generally weakened property right, but rather in determining reasonable alternative means, in that if the employees are indistinguishable from the general public, then the target audience may be difficult to identify.<sup>3</sup> The Board has yet to acknowledge that property owners possess the right to exclude which does not wane with each invited guest. *See Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (noting that nearly every retail and service establishment is "open to the public" and any infringement of "long-settled rights of private property" on that basis is unwarranted).

Accordingly, not only does the brief filed on behalf of respondent National Labor Relations Board perpetuate the faulty image of a scale that is balancing Section 7 rights and private property rights as if they were rights of equal weight and standing, but it also demonstrates how the Board since *Fairmont Hotel* and *Jean Country* has failed to examine the

<sup>3</sup> This is not so in the case at hand, where employees reported for work before the arrival of the store's customers, and where they remained on the premises after the store closed. J.A. 22-23, 73-74; Pet. Br. 26 n.7.

nature and strength of those rights in a manner that will facilitate its determination of whether access is truly necessary.

Lechmere respectfully requests that the judgment and decree of the United States Court of Appeals be reversed and enforcement of the order of the National Labor Relations Board be denied.

Respectfully submitted,

ROBERT P. JOY, *Counsel of Record*  
KEITH H. McCOWN  
BENJAMIN SMITH  
MORGAN, BROWN & JOY  
One Boston Place  
Boston, Massachusetts 02108

*Counsel for Petitioner,  
Lechmere, Inc.*

MAY 8 1991

No. 90-970

OFFICE OF THE CLERK

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

**Brief Amicus Curiae of the International Council  
of Shopping Centers, Inc., in Support of Petitioner**

STEPHANIE McEVILY\*  
EDWARD J. SACK  
665 Fifth Avenue  
New York, New York 10022  
(212) 421-8181

*Counsel for the International  
Council of Shopping Centers, Inc.*

*\*Counsel of Record*

## TABLE OF CONTENTS

Identity and Interest of the <i>Amicus Curiae</i> .....	1
---	---

### ARGUMENT

POINT I—The <i>Babcock</i> rule is the applicable standard in determining whether a union must be granted access to private property and the First Circuit erred in allowing the Board to invert, and effectively overrule, <i>Babcock</i> .....	2
--	---

POINT II—This Court should uphold the primacy of private property rights over dilution by the Board.	5
--	---

Conclusion .....	10
------------------	----

### APPENDIX

Memorandum of Decision of Superior Court, Judicial District of Hartford-New Britain at Hartford in <i>Cologne v. Westfarms Associates</i> .....	1a
---	----

### TABLE OF AUTHORITIES

#### Cases:

<i>Citizens for Ethical Government, Inc. v. Gwinnett Place Associates</i> , 260 Ga. 245, 393 S.E.2d 8.....	7
<i>Cologne v. Westfarms Associates</i> , 192 Conn. 48, 469 A.2d 1201 (1984).....	7, 8
<i>Dexter Thread Mills</i> , 81 L.R.R.M. 1293 (1972).....	4
<i>Falk Corporation</i> , 192 NLRB No. 100, 1971 NLRB Dec. (CCH) ¶23, 37. ....	3
<i>Hudgins v. National Labor Relations Board</i> , 424 U.S. 507 (1976). ....	6
<i>Jacobs v. Major</i> , 193 Wisc. 2d 492, 407 N.W.2d 832 (1987) .....	7, 8
<i>Jean Country</i> , 291 NLRB No. 89, 1988-89 NLRB Dec. (CCH) 15, 118 (1989), 132 L.R.R.M. (BNA) 1329 (1989) .....	4, 5



<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313 (1st Cir. 1990) .....	4
<i>Monogram Models</i> , 877 LRRM 1913 (1971) .....	3
<i>NLRB v. Babcock &amp; Wilcox</i> , 351 U.S. 105 (1956). .....	2, 3, 4, 5
<i>Pruneyard v. Robbins</i> , 447 U.S. 74 (1980) .....	6
<i>Shad Alliance v. Smith Haven Mall</i> , 66 N.Y.2d 496, 498 N.E.2d 1211 (1985).....	7
<i>Southcenter Joint Venture v. National Democratic Policy Committee et al.</i> , 113 Wash.2d 413, 780 P. 282 (1989) .....	7
<i>State v. Felmet</i> , 302 N.C. 173, 273 S.E.2d 708 (1981) .....	6
<i>Western Penn. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.</i> , 512 Penn. 23, 515 A.2d 1331 (1986).....	7
<i>Woodland v. Michigan Citizens Lobby</i> , 423 Mich. 188, 378 N.W.2d 337 (1985) .....	7
<i>Miscellaneous:</i>	
Carpenter, <i>Shopping Center Management</i> , 3rd ed. ICSC New York (1984) .....	6
ICSC Research Bulletin, Vol. 2, No. 2, ICSC, New York (1991).....	9
Roswick and McEvily, "Use Clauses in Shopping Center Leases: The Effect of the Tenants Bank- ruptcy" 14 R.E.L.J. 3 (Summer 1985).....	6

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

**Brief Amicus Curiae of the International Council  
of Shopping Centers, Inc., in Support of Petitioner**

This brief is respectfully submitted on behalf of the International Council of Shopping Centers, Inc., as *amicus curiae*. Pursuant to Rule 37.2 of the rules of this Court, ICSC has obtained and filed the written consent of each of the parties to the filing of this brief. ICSC supports the position of the petitioner in this case and urges that the decision below be reversed.

**Identity and Interest of Amicus Curiae**

The International Council of Shopping Centers, Inc. (hereinafter referred to as ICSC), is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. ICSC has approximately 26,500 members worldwide and approximately 24,000 in the United States.

ICSC is the trade association for the shopping center industry. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

ICSC members have a clear interest in the disposition of the present case because the holding of the First Circuit Court of Appeals enforcing the order of the National Labor Relations Board (NLRB) would replace the long-standing rule established in *Babcock & Wilcox*<sup>1</sup> with a new standard which would virtually obliterate private property rights, shift the burden of proving that there are no reasonable alternative means to disseminate a union's message to employees from the union to the employer, and sanction the NLRB's change in policy without a reasoned analysis.

Reference is made to the brief of the petitioner for a statement of the facts of this case and the applicable statutes. This brief will be confined to the aspects of the case specifically related to shopping centers.

## ARGUMENT

### POINT I

**The *Babcock* rule is the applicable standard in determining whether a union must be granted access to private property and the First Circuit erred in allowing the Board to invert, and effectively overrule, *Babcock*.**

In *NLRB v. Babcock & Wilcox*,<sup>2</sup> this Court clearly enunciated the circumstances under which private property

<sup>1</sup> *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

<sup>2</sup> *Id.*

rights yield to the right of employees to organize. "An employer may post his property against nonemployee distribution of union literature" unless (1) reasonable efforts by the union to reach employees with the message fail (i.e., if the location of the employer and living quarters of employees place employees beyond the reach of reasonable efforts of the union to communicate with them) or (2) the employer discriminates against the union by allowing other distribution. Thus the Court has established that the employer/property owner's right is paramount and may not be disturbed unless either the union cannot reach the employees or the employer discriminates against union distribution of literature.<sup>3</sup>

There is no question that the property owner in the instant case did not discriminate against the union. It promulgated and enforced uniform no-solicitation rules. The issue then is whether the union was able to reach the employees by alternative means, whether the "inaccessibility of employees [made] ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels . . . ." <sup>4</sup> Reasonable efforts include personal contact on streets or at home; telephone contact, letters, or advertised meetings.<sup>5</sup> See also *Mono-gram Models, Inc.*, where the Board refused to establish distinct rules for reaching employees in large metropolitan areas.<sup>6</sup>

The Board itself has stated that "[i]t [was] not unreasonable to expect a union to try to reach employees at their homes by telephone, even if they do live in a large metropolitan area."<sup>7</sup> It further suggested banners on public property, in-plant committees of employees, and employee

<sup>3</sup> *Id.* at 112.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 111.

<sup>6</sup> 77 LRRM 1913 (1971).

<sup>7</sup> *Falk Corporation*, 1971 CCH NLRB ¶23, 371 at 30, 209, 192 NLRB No. 100.



distribution of literature in the workplace.<sup>8</sup> In *Dexter Thread Mills*,<sup>9</sup> the union had met with little success in making home contact, but had initially copied down license plate numbers on cars entering the parking lot before 9:00 a.m. The Board recommended that the union pursue that method further, and were not convinced that there were not "reasonable, albeit perhaps more expensive and less convenient means of reaching employees."<sup>10</sup>

In the case at hand, the union did not fail to reach employees: it had contacted 20% of them through the mail; had secured addresses by copying license plate numbers and had made home visits; had placed five advertisements in local newspapers; had distributed handbills; and had picketed on public property. Judge Torruella's dissent in the decision below thoroughly analyzes the effective means available to the union with which to reach the targeted employees and compares these methods to those in the *Babcock* case.<sup>11</sup> The decisions below confuse *access* with *success*. The union did not even exhaust all the alternative means at its disposal. Significantly, it did not utilize the one individual who *did* respond positively to its efforts by having that employee meet with his fellow employees or distribute literature to them.

*Jean Country*<sup>12</sup> and its progeny have perverted the Supreme Court's unambiguous pronouncement to allow access to private property only if there is a "clear showing . . . that reasonably effective alternative means were unavailable in the circumstances." The Board has created a presumption in favor of the union which the property owner must overcome in order to defend his right to

<sup>8</sup> *Id.*

<sup>9</sup> 81 LRRM 1293 (1972).

<sup>10</sup> *Id.* at 1295

<sup>11</sup> *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 326-327 (1st Cir. 1990).

<sup>12</sup> *Jean Country*, 291 NLRB No. 89, 1988-89 NLRB Dec. (CCH) ¶15,118 (1989), 132 LRRM (BNA) 1329 (1989).

control the use of his property. We respectfully submit that this perversion should not be allowed and that this Court affirm the *Babcock* rule.

## POINT II

### **This Court should uphold the primacy of private property rights over dilution by the Board.**

"The [National Labor Relations] Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."<sup>13</sup> Thus did this Court establish that no affirmative actions were required of an employer or property owner in order to comply with the dictates of the Act. As long as other channels were available for the exercise of employees' rights—and, in the instant case they were—an employer is not obliged to open his property for the use of the union. As discussed above, the employer/property owner's rights may only be infringed in extreme circumstances. These rights are not diluted, as the Board in *Jean Country* stated, by "certain quasi-public characteristics."<sup>14</sup>

The court below gave very little weight to private property interests of the shopping center and its tenants. The court said that the "Petitioners' property interest was diluted by the public nature of the parking lot and the nonexclusivity of its use."<sup>15</sup> This led the circuit court to the conclusion that the trespass was "minimally intrusive."<sup>16</sup> This interpretation of the intended use of the parking lot ignores the business context of the property rights at issue: the public is invited to use the lot only while they patronize the tenants in the center. In fact

<sup>13</sup> *Babcock, supra*, n.1 at 113-114.

<sup>14</sup> *Jean Country, supra*, n.12 at 28, 386.

<sup>15</sup> 914 F.2d 313 at 321.

<sup>16</sup> *Id.* at 323.



many centers tow away unauthorized vehicles at the owner's expense.

A shopping center is a group of retail stores and related business facilities, the whole planned, developed, operated and managed as a unit.<sup>17</sup> Tenants are selected in order to provide a mix of services to attract customers, with each tenant enhancing the business of the others, to provide a synergism which makes the whole greater than the sum of its parts.<sup>18</sup> Accordingly, any interference in the business of one tenant inevitably affects the business of the other tenants. Thus the distribution of handbills related to a labor dispute presents the shopping center and its tenants with precisely the same problems as the distribution of handbills relating to political matters.

Although this Court in *Hudgins*<sup>19</sup> said that labor matters are governed by the National Labor Relations Act, in balancing the property rights under this Act, the Court should consider the line of cases which protect shopping centers from the unwanted distribution of political handbills. This Court in *Pruneyard v. Robbins*<sup>20</sup> held that a state could require a shopping center to permit political activities on its private property under reasonable rules and regulations without violating a center owner's federal constitutional rights. This made the issue of public access for political activities a state matter. Since *Pruneyard*, however, supreme courts in the states of North Carolina,<sup>21</sup>

<sup>17</sup> Carpenter, *Shopping Center Management*, 3rd ed. ICSC, New York (1984), p. 2.

<sup>18</sup> Roswick, McEvily, "Use Clauses in Shopping Center Leases: The Effect of the Tenants Bankruptcy," 14 R.E.L.J. 3, 6 Summer 1985.

<sup>19</sup> *Hudgins v. National Labor Relations Board*, 424 U.S. 507 (1976).

<sup>20</sup> 447 U.S. 74, 100 S.Ct. 2035 (1980).

<sup>21</sup> *State v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981).

Connecticut,<sup>22</sup> Michigan,<sup>23</sup> New York,<sup>24</sup> Pennsylvania,<sup>25</sup> Wisconsin,<sup>26</sup> Washington<sup>27</sup> and Georgia<sup>28</sup> have upheld the private property rights of shopping center owners to prevent the distribution of handbills and the conduct of other political activities. In adopting the reasoning of this Court in *Lloyd Corporation v. Tanner*,<sup>29</sup> the Georgia Supreme Court, in the most recent state supreme court case addressing the issue, rejected the argument that shopping malls are "the new town centers" and stated: "This court recognizes that shopping malls represent a fertile potential source of signatures for petitioners in a recall election effort. *Petitioners' convenience*, however, does not create a constitutional right of access to private property for political activity."<sup>30</sup> Thus, not only this Court, but eight state supreme courts, when faced with treating private property like public property, have refused to dilute private property rights in favor of public—even constitutionally significant—issues.

Furthermore, shopping centers oppose the right of non-employees to enter upon and use private property for the purpose of organizing employees where there are alternative means of communicating with the targeted employees because

<sup>22</sup> *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984).

<sup>23</sup> *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W. 2d 337 (1985).

<sup>24</sup> *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.E.2d 1211 (1985).

<sup>25</sup> *Western Penn. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Penn. 23, 515 A.2d 1331 (1986).

<sup>26</sup> *Jacobs v. Major*, 193 Wisc. 2d 492, 407 N.W.2d 832 (1987).

<sup>27</sup> *Southcenter Joint Venture v. National Democratic Policy Committee, et al.*, 113 Wash. 2d 413, 780 P.2d 282 (1989).

<sup>28</sup> *Citizens for Ethical Government, Inc. v. Gwinnett Place Associates*, 260 Ga. 245, 392 S.E.2d 8 (1990).

<sup>29</sup> 407 U.S. 551 (1972).

<sup>30</sup> *Citizens for Ethical Government, Inc. v. Gwinnett Place Associates*, *supra*, n.28 (emphasis added).

of the risk of significant interference with the business of the center. The other tenants of the shopping center, who are neutral to the dispute, may suffer economic hardship as a result of the nonemployees' presence.

As stated above, the synergistic interrelationships of the tenants in a shopping center are a unique and critical aspect of the enterprise. Any disruption of the business of one tenant reduces traffic to the center and damages all the businesses in the center.

There have been two judicially documented cases of economic harm from forced public access to shopping centers. In the *Cologne* case, *supra*,<sup>31</sup> the lower court had permitted the National Organization of Women to solicit signatures on petitions. The Ku Klux Klan then announced that it would come to the mall to solicit membership. When members of the Klan appeared, the mall denied them entrance, and they left peacefully. Subsequently, a number of anti-Klan demonstrators appeared and engaged in a heated demonstration, and a confrontation which could only be described as a riot occurred. Several stores in the mall had to close for a portion of the day. The interference with business was clearly established. These events were described in a Memorandum of the Superior Court, dated August 13, 1983. (Copy annexed for the convenience of the Court.)

The second incident occurred in the Wisconsin mall involved in the *Jacobs* case, *supra*.<sup>32</sup> There, a group of dancers performed a symbolic dance about nuclear war, concluding with a "die in" in which bystanders were invited to join the dancers in lying motionless on the floor for several minutes. The court found that several stores within the mall suffered an identifiable reduction in sales that day.

<sup>31</sup> *Cologne v. Westfarms*, *supra*, n.22.

<sup>32</sup> *Jacobs v. Major*, *supra*, n.26.

Even without violent or dramatic events, financial harm to uninvolved parties is inevitable as a result of access for political or labor-related activities. Consequently, all the tenants in a shopping center are affected by events which involve one of the tenants, whether it is a bankruptcy, a demonstration, or a union activity.

Although it may not be as incendiary as a Ku Klux Klan demonstration, a union activity may spark counter-demonstrations or at least excite controversy. Consider, for example, the recent events surrounding the *New York Daily News*.

It is not a court's function to try to determine whether or not a particular kind of public access is the type which may result in economic harm to the targeted shopping center. The fact is that public opinion polls conducted by the ICSC and others have produced virtually uniform results showing that many individuals are negatively affected by noncommercial activity at shopping centers. The results of a recent Gallup Poll sponsored by the ICSC to survey the public's attitudes regarding access to shopping centers indicated that roughly half (49%) of those who responded felt that public access decisions should be left to the management of the center and an additional 21% wanted management to keep all groups out of centers.<sup>33</sup>

These are individuals who will avoid the part of the center where the activity occurs or will avoid the mall altogether and shop elsewhere.

The interference with commercial activity is directly proportional to the level of controversy surrounding the group, but polls indicate that there is always a small percentage of shopping center patrons who are concerned even with noncontroversial groups. Consequently, the rights of neutral parties, *i.e.*, the other shopping center

<sup>33</sup> ICSC Research Bulletin, Vol. 2, Number 2, ICSC, New York (1991) p. 1.

tenants, are infringed when nonemployees come onto private property for noncommercial reasons.

ICSC submits that the court below failed to give proper weight to the impact of the trespass by finding it "minimally intrusive."

### CONCLUSION

**For the reasons set forth above, the International Council of Shopping Centers, as *amicus curiae*, supports the petitioner and respectfully requests this Court to reverse the First Circuit's erroneous decision.**

Respectfully submitted,

STEPHANIE McEVILY\*  
EDWARD J. SACK  
665 Fifth Avenue  
New York, New York 10022  
(212) 421-8181

*Counsel for the International  
Council of Shopping Centers, Inc.*

\**Counsel of Record*

### **Memorandum of Decision of Superior Court, Judicial District of Hartford-New Britain at Hartford in *Cologne vs. Westfarms Associates***

No. 274171

CHRISTINE A. COLOGNE, ET AL : SUPERIOR COURT

VS. : JUDICIAL DISTRICT OF  
HARTFORD-NEW BRITAIN  
WESTFARMS ASSOCIATES : AT HARTFORD

AUGUST 13, 1983

### **MEMORANDUM OF DECISION**

### **ON**

### **MOTION TO DISSOLVE INJUNCTION**

The named plaintiff in the above-entitled matter together with the Connecticut Chapter National Organization of Women, by complaint dated July 15, 1982 sought injunctive relief against the defendants who, as owners of premises commonly known as Westfarms Mall, denied access to such premises to the plaintiffs. The plaintiffs claimed a right to enter the Mall for purposes of soliciting signatures on petitions and other activities consistent with their general aims and objectives. The plaintiffs based their claim of right on the constitutional rights of liberty of speech and assembly. Article First, Sections Four and Fourteen, respectively, Constitution of the State of Connecticut as well as Article First, Section Twenty, the equal protection clause, on the grounds that while the defendants allowed some groups access for purposes of disseminating information on public matters, other groups, and particularly the plaintiffs, were denied the equivalent right. After a lengthy hearing, Spada, J., issued a memorandum of decision on February 28, 1983 affirming the plaintiffs claim and establishing for at least this case constitutional rights in favor of the plaintiffs for their use of the defendants private premises. The memorandum of decision,



however, did not recognize unfettered constitutional rights but rather strictly circumscribed the exercise of the plaintiffs rights by several restrictions including time, place and manner for the conduct of their lawful activities.

This decision embodied in the judgment of March 2, 1983 thus becomes the law of this case pending the disposition of the appeals from the judgment as on file.

The present motion to dissolve the injunction was filed by the defendants on May 25, 1983 and was occasioned by a certain series of incidents which occurred on May 22, 1983 and immediately prior thereto. The evidence presented in support of the motion established that the Klu Klux Klan shortly prior to May 22, 1983 sought permission to utilize the premises for their own purposes of public information equating their claimed right of access as equivalent to the plaintiffs. While the defendants denied the request and subsequently the K.K.K. acquiesced in that decision, two other groups somehow acquired the information that the K.K.K. would be on the premises at noon or thereabouts on May 22, 1983 and appeared to conduct a counter-demonstration. This resulted in a confrontation between these groups and the police forces who were on or near the premises in anticipation of the Klan activities. While the situation was brought under control it was not done so without a considerable protracted disturbance as recorded by police video cameras as well as local television camera coverage. Several persons were injured, there was considerable financial loss and disruption to business tenants of the defendants, not only during the demonstration but during the entire day as demonstrated by comparative income figures offered through witnesses for the defendants. Additionally, customers of G. Fox & Co. were treated to the spectacle of police in full riot gear together with at least one police dog removing one of the demonstrators across the sales floor. The main entrance doors to the G. Fox sales premises were locked during the period of the confrontation which was in excess of an hour thus

eliminating a major exit route to persons inside the premises should the need arise. Police witnesses expressed the opinion that had this confrontation occurred inside the mall the results would be uncontrollable and disastrous in terms of potential physical injury to police, customers and tenants and their employees as well as damage to property.

There can be no dispute under Connecticut law that courts have inherent power to change or modify their own injunctions where circumstances have so changed as to make it equitable to do so. *Adams v. Vaill*, 158 Conn. 478, 482.

The events recited above and the potential of harm that appears likely to occur if the injunction continues in its present form requires this court to modify certain provisions of the injunction as granted by Judge Spada. It is unfortunate that in order to try to reduce the possibility of a recurrence of the events of May 22, 1983 that the activities of the plaintiffs will be affected as the evidence is clear that they bear no responsibility in the matter but as Judge Spada balanced the interests of the parties in reaching his decision so this court must also balance the interests of all the parties involved and affected by the events of May 22, 1983.

The police officers testified that interior access to the mall by persons or organizations under a claim of right by the earlier decision in this case present a highly dangerous situation for the reasons stated above. Control is impossible in such a location.

Accordingly, the rights of access and limitations thereon as granted to the plaintiffs by Judge Spada in his judgment of March 2, 1983 will continue in effect with the exception of the designation by the defendants of the single location in the Grand Court of the Mall and paragraphs (4) and (5) as relating thereto. The location of the activities permitted to the plaintiffs is hereby modified and those activities are

4a

hereby relocated to the exterior of the building under the portico located at the middle or east entrance between the Sage Allen and G. Fox entrances or stores on the east side of these premises. The location under the portico shall be as designated by the defendants. In all other respects, the injunction remains in full force and effect.

/s/     *Ripley*     , J.  
GEORGE W. RIPLEY

MAY 9 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

LECHMERE, INC.,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

**BRIEF OF AMICUS CURIAE COUNCIL ON LABOR  
LAW EQUALITY IN SUPPORT OF PETITIONER**

GERARD C. SMETANA\*  
RICHMAN, LAWRENCE,  
MANN, GREENE &  
SMETANA  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 855-0300

*Of Counsel:*

MICHAEL E. AVAKIAN  
RICHMAN, LAWRENCE, MANN  
GREENE & SMETANA  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 659-8687

Attorneys for *Amicus Curiae*  
Council on Labor Law Equality  
*\*Counsel of Record*



TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
ISSUES PRESENTED .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
THE COURT MUST CLARIFY THE RULE THAT NONEMPLOYEE ACCESS TO EMPLOYER PROP- ERTY IS NOT AUTHORIZED BY THE NLRA EX- CEPT FOR UNION OFFICIALS IN UNIQUE CIR- CUMSTANCES BY WHICH ACCESS BECOMES THE RARE EXCEPTION TO THE RULE .....	3
A. THE LINE DRAWN FOR APPLYING NONEMPLOYEE ACCESS TO AN EM- PLOYER'S PROPERTY MUST BE SET IN CIRCUMSTANCES WHERE A LABOR OR- GANIZATION ESTABLISHES IT HAS NO OTHER PHYSICAL MEANS TO REACH THE TARGETED WORKERS .....	4
B. AN EMPLOYER DOES NOT LOSE ITS RIGHT TO CONTROL THE EXCLUSIVE USE OF ITS PROPERTY WHEN IT ALLOWS THE PROPERTY TO BE USED FOR COM- MERCIAL PURPOSES .....	7
C. THE PROPOSED BRIGHTLINE TEST TO PROTECT PRIVATE PROPERTY WHERE THE "USUAL MEANS" OF EMPLOYEE	

COMMUNICATION REMAINS OPEN, REQUIRES THE COURT TO REVISIT ITS RULINGS IN <i>SCOTT HUDGENS</i> AND <i>SEARS ROEBUCK &amp; CO.</i> AND HARMONIZE THESE AUTHORITIES .....	13
CONCLUSION .....	18

## TABLE OF AUTHORITIES

CASES .....	Page
<i>Adderly v. Florida</i> , 385 U.S. 39 (1966) .....	9
<i>Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968) .....	7, 8
<i>Babcock &amp; Wilcox</i> , 351 U.S. 105 (1956) .....	<i>passim</i>
<i>Boys Markets, Inc. v. Retail Clerks Union, Local 770</i> , 398 U.S. 235 (1970) .....	13, 17
<i>Breard v. City of Alexandria, LA</i> , 341 U.S. 622 (1951) .....	12
<i>Butterfield Theaters</i> , 292 N.L.R.B. No. 8 (1988) .....	16
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	7, 8, 14
<i>Dolgins</i> , 293 N.L.R.B. No. 102 (1989) .....	16
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	5
<i>Falk Corp.</i> , 192 N.L.R.B. 716 (1971) .....	7
<i>Federated Dept Stores</i> , 294 N.L.R.B. No. 49 (1989) .....	15

<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978) .....	11
<i>Frisby v. Schultz</i> , 108 S. Ct. 2495 (1988) .....	12
<i>Granco, Inc.</i> , 294 N.L.R.B. No. 7 (1989) .....	16
<i>Green v. Biddle</i> , 21 U.S. 1 (1823) .....	9
<i>Hardees Food Systems</i> , 294 N.L.R.B. No. 48 (1989) .....	15
<i>Jean Country</i> , 291 N.L.R.B. No. 4 (1988) .....	2, 17
<i>Little &amp; Co.</i> , 296 N.L.R.B. No. 89 (1989) .....	16
<i>Lloyd Corp., Ltd. v. Tanner</i> , 407 U.S. 551 (1972) .....	3
<i>May Dept Stores Co. v. NLRB</i> , 316 F.2d 797 (6th Cir. 1963) .....	14
<i>Monogram Models, Inc.</i> , 192 N.L.R.B. 705 (1971) .....	7
<i>Mountain Country Food Store</i> , 292 N.L.R.B. No. 100 (1989) .....	16
<i>NLRB v. Kutshers Hotel &amp; Country Club, Inc.</i> , 427 F.2d 200 (2d Cir. 1970) .....	14

<i>Perry Educ. Assn v. Perry Local Educ. Assn</i> , 460 U.S. 37 (1983) .....	10
<i>PruneYard Shopping Center v. Robbins</i> , 446 U.S. 74 (1980) .....	12
<i>Red Food Stores</i> , 296 N.L.R.B. No. 62 (1989) .....	16
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	7, 7, 17
<i>Scott Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	5, 13, 14, 17
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. of Carpenters</i> , 436 U.S. 180 (1978) .....	14, 15
<i>Sentry Markets, Inc. v. NLRB</i> , 914 F.2d 113 (7th Cir. 1990) .....	16
<i>Southern Servs., Inc.</i> , 300 N.L.R.B. No. 161 (1990) .....	17
<i>Taggart v. Weinackers, Inc.</i> , 397 U.S. 223 (1970) .....	8
<i>Target Stores</i> , 292 N.L.R.B. No. 93 (1989) .....	16
<i>Tecumseh Foodland</i> , 294 N.L.R.B. No. 37 (1989) .....	15
<i>Truax v. Corrigan</i> , 257 U.S. 312 (1921) .....	9, 11



<i>United States v. Kokinda</i> , 110 S. Ct. 3115 (1990) .....	10
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) .....	11

#### STATUTES

<i>National Labor Relations Act</i> , 29 U.S.C. § 157 .....	3
29 U.S.C. § 158(c) .....	11

#### MISCELLANEOUS

<i>Concept of Quasi-Public Property</i> , 49 Minn. L. Rev. 505, 507-08 (1965) .....	
<i>Metro Care Services, Inc.</i> , 1990 N.L.R.B. GCM LEXIS 68 (Oct. 31, 1990) ...	12

---

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

---

LECHMERE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

---

### BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

#### INTEREST OF *AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board ("Board"), related developments under the National Labor Relations Act, and to provide support to employer interests on those issues that affect a broad section of industry. COLLE's participation in the Petition stage of this case reflects its concerns for the failure of the Board, as affirmed by the court below, to follow the precedent of this Court and of the failure to apply proper principles with respect to property rights. COLLE's continued participation recognizes the need for setting forth a specific legal test to apply in cases in which a labor organization demands access to an employer's property

Further interests of *amicus* are set out in the COLLE's prior brief *amicus curiae*.

#### ISSUES PRESENTED

Whether the correct legal test to determine when a union in an organizational drive may have access to an employer's property

turns on whether the union has any other objective means in which to reach the targeted employer's workers with its message; not whether the other means of communication available to the union are, have been or may be less effective than physical intrusion upon employer property.

Whether the test outlined above is consistent with the accommodation applied by the Court in the *Scott Hudgens* balancing approach, ostensibly followed by the Board in its new *Jean Country* test.

### SUMMARY OF ARGUMENT

The Court's decisions since and including *Babcock & Wilcox*, 351 U.S. 105 (1956), show that in the Court's view, only few situations would demonstrate the necessary inaccessibility to workers that could immunize a trespass onto an employer's property. In each case considering union trespass and property rights, the Court has carefully reasserted an employer's right to impose nondiscriminatory access rules on its property: *NLRB v. Babcock & Wilcox*; *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978).

The issue has always been framed by the Court in terms of the *objective availability* of alternative means of union communication with employees where those employees are physically "inaccessible" to the union. "Inaccessibility" is not met simply because the union has not secured an adequate level of unionization as the Board's result in *Jean Country*, 291 N.L.R.B. No. 4 (1988), purports.

For these reasons, the Court must further define for the Board and the courts below that not only is trespass forbidden by nonemployees in an organizational campaign, but that "inaccessibility" as used in *Babcock & Wilcox* means physical

inability to reach the workers with its message through any other objective means of communication.

### ARGUMENT

**THE COURT MUST CLARIFY THE RULE THAT NONEMPLOYEE ACCESS TO EMPLOYER PROPERTY IS NOT AUTHORIZED BY THE NLRA EXCEPT FOR UNION OFFICIALS IN UNIQUE CIRCUMSTANCES BY WHICH ACCESS BECOMES THE RARE EXCEPTION TO THE RULE**

It is the position of *amicus curiae* that the Court generally settled the issue of labor union access in *Babcock & Wilcox*, 351 U.S. 105 (1956). Under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, individual workers have the right to choose or refrain from enjoying collective representation. Derivative of this personal right is the right to organize. Yet, the derivative nature of that right has limitations. The proper nonemployee access test may be formulated as follows:

Nonemployee union members shall have no right of access to an employer's property unless the union can prove by objective evidence that it lacks means available to communicate with employees because they work or live at locations inaccessible to the activist union members.

This test derives its essence from several cases already decided by the Court: *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978).

*Amicus* demonstrates below how each aspect of this test is supported by the Court's precedent and common sense logic.

A. THE LINE DRAWN FOR APPLYING  
NONEMPLOYEE ACCESS TO AN EM-  
PLOYER'S PROPERTY MUST BE SET IN  
CIRCUMSTANCES WHERE A LABOR OR-  
GANIZATION ESTABLISHES IT HAS NO  
OTHER PHYSICAL MEANS TO REACH  
THE TARGETED WORKERS

An employer's interest in preserving its property for an exclusive use was first protected from the Board's authority in *Babcock & Wilcox Co. v. NLRB*, *supra*. There, as in the case at bar, non-employee organizers were permitted by the Board to engage in activities upon the employer's property, even in the face of a nondiscriminatory no solicitation policy. *Id.* at 107. It was the Board's position that unless access was ordered, "union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. The Court rejected this position. It ruled that,

an employer *may validly post his property* against nonem-  
ployee distribution of union literature *if reasonable*  
*efforts by the union through other available channels of*  
*communication will enable it to reach the employees* with  
its message and if the employer's notice or order does  
not discriminate against the union by allowing other  
distributions.

*Id.* at 112 (emphasis added).

The possibility of access was left open by the Court only "when the inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels...." *Id.* Those "usual channels" were set out by the Court in footnote 1 of its opinion. The Court expected these efforts to include distribution of union literature, use of the mails, talking to employees "on the streets," driving to their homes, and talking with them over the telephone.

*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), reinforces this principle. That case involved the consolidation of two fact patterns. Republic Aviation had banned wearing of union insignia by its employees; the Le Tourneau Company had disciplined employees for distributing union literature in the company's parking lots. The Board had found and the Court agreed that the employers could not "enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property." 324 U.S. at 802 n.8. This case establishes that an employer may not restrict the activities of its own workers' union related activities on its property while they are not working, but properly on its property.<sup>1</sup>

*Amicus* finds essential to the Court's discussion of *Republic Aviation*, the Court's response to the employers' argument that their non-solicitation rules did not interfere with or specifically discourage union organization and therefore access must be denied. The Court explained that the neutrality of the rule they were advancing was not determinative in their situations since off property activity was not in issue.

Neither in the Republic nor the Le Tourneau cases can it properly be said that there was evidence or a finding that *the plant's physical location made solicitation away from company property ineffective* to reach prospective union members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or *be seriously handicapped*.

324 U.S. at 798 (emphasis added).

---

<sup>1</sup>Also *Scott Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (different balance struck when persons are employees already on the employer's property); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571-72 (1978) (explaining distinction).



In this light, *Babcock & Wilcox*, 351 U.S. at 109, recognized that the Board in the *Le Tourneau* case had properly "balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time." However, in *Babcock & Wilcox*, 351 U.S. at 111, the Court also rejected the Board's further assertion for authorizing an invasion: "that nonemployee union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees."

The Board's critical deficiency in 1956 was its refusal to "make a distinction between rules of law applicable to employees and those applicable to nonemployees...no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration." *Babcock & Wilcox*, 351 U.S. at 113. Nonemployee access, then, turns upon whether,

the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.

*Id.*

Therefore, when a union has at its disposal the use of these open methods of communications "to reach the employees with its message," 351 U.S. at 111, it would appear to be clear that in turn, "[i]n these circumstances, the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." *Id.* at 112 (emphasis added).

In Petitioner *Lechmere's* situation, union organizers capably picketed *Lechmere's* property at times when the employees were proceeding to and from work, became apprised of the addresses of 20% of the workers, acquired telephone numbers, picketed for several months, and received at least one signed authorization card from a *Lechmere* employee. Pet. A-6. Hence, "the usual methods of imparting information [was] available" to the union.

*Id.* at 113.<sup>2</sup> Moreover, because the union had in fact signed up one worker, that worker had a right to solicit fellow employees on company property during nonworking time under *Republic Aviation; Lechmere's no-solicitation policy only applied to "Non-associates."* J.A. 122. The union plainly had access to Petitioner's property and its methods did clearly reach employees, although not in sufficient numbers to its liking or to the Board's.

**B. AN EMPLOYER DOES NOT LOSE ITS RIGHT TO CONTROL THE EXCLUSIVE USE OF ITS PROPERTY WHEN IT ALLOWS THE PROPERTY TO BE USED FOR COMMERCIAL PURPOSES**

In *Central Hardware Co. NLRB*, 407 U.S. 539 (1972), the Court found a store surrounded on three sides by a parking lot. Nonemployee union organizers solicited Central's workers on company property. Because of complaints, Central enforced its nonsolicitation rule and at least one organizer was arrested for trespassing. *Id.* at 541. This time, the Board held the company's no solicitation rule was "overly broad." Based upon the Court's decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ("*Logan Valley*"), the Eighth Circuit enforced the Board's Order.

This Court reiterated that in *Babcock & Wilcox*, the Board's imposition of a servitude on the employer's property was an improper exercise of jurisdiction because "the availability of alternative channels of communication made the intrusion on the employer's property rights ordered by the Board unwarranted."

---

<sup>2</sup>These alternative means are not unprecedented. Newspapers, radio, and television have been recognized as feasible channels of communication. *Falk Corp.*, 192 N.L.R.B. 716, 721 (1971) (union used handbills, meetings and other methods). Compare *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706 n.5 (1971) (employees not beyond union reach even though plant located along a four lane, 40 m.p.h. road), with the four lane, 50 m.p.h. highway adjacent to *Lechmere Plaza*. J.A. 114: R. 4-5.

*Id.* at 544. Furthermore, the accommodation principle articulated in *Babcock & Wilcox* was required "only in the context of an organization campaign." *Id.* at 544-45.

The Board's critical error in *Central Hardware* was finding that because the employer had invited customers to drive onto its parking lots rather than restricting parking lot use to employees only, as had *Babcock & Wilcox*, this "diluted" the employer's property interest. The Court strongly disagreed that Central's lots had "acquired the characteristics of a public municipal facility": "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Id.* at 547. Since this fact was the only one relied upon by the Board, in misreading *Logan Valley*, the Court found the Board's order "an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* The Court remanded the case for the Board to consider the question whether any reasonable means to communicate with the workers was available "other than solicitation in Central's parking lots." *Id.*

The result in *Central Hardware* compares favorably with the Court's prior action in *Taggart v. Weinacker's*, 397 U.S. 223 (1970). In *Taggart*, a state court in Alabama had issued an injunction prohibiting labor union picketing on the premises and property of a single retail store, its adjacent parking lot, and sidewalk. The picketing was allowed only on adjacent public sidewalks, an entirely proper alternative locus to reach the very same persons. Both employee and nonemployee union picketers were involved. Because of the union's failure to contest the affidavits in support of the employer's charges of obstruction, the writ of certiorari was dismissed, and so the employer's action to enjoin the picketing was sustained.

As set out in the concurrence of Chief Justice Burger in *Taggart*, "[t]he protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of

state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer with the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises." 397 U.S. at 227.<sup>3</sup>

The result in *Taggart* shows that the Court permitted the state court to preserve an employer's property for its lawful business use and to avoid interference with that purpose. This Court has "vigorously and forthrightly rejected" the faulty premise that "people who want to propagandize protests or views have a constitutional right to do so, whenever, however and wherever they please." *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966). Keeping nonemployee union personnel (equally with non-business solicitors) off an employer's property is an appropriate measure to regulate organizational activity reasonably without impairing the union's ability to communicate freely its message to the workers at all other places. The protection of property through common law trespass is a fundamental tenet of American jurisprudence.

A business employer's ownership of property includes the right to control, protect, and defend the boundaries of its possession. *Green v. Biddle*, 21 U.S. 1 (1823) (trespass quare clausum fregit). Its business is itself a property right. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

In the present case, the employer's property interest includes the exclusive use of his property to return an economic profit. The Board's calculus does not consider the financial cost to the property owner by commanding union access. Neither does it consider the confusion caused to the customers who were cultivated by the employer through the expenditure of considerable advertising money. This "volatile influence on certain audiences" of picketing, is the tangible fact that it "involves custom-

---

<sup>3</sup>The undersigned attorney for *amicus curiae* COLLE participated in *Taggart v. Weinacker's, Inc.*; *Lloyd Corp., Ltd. v. Tanner*; *Central Hardware Co. v. NLRB*; and *Scott Hudgens v. NLRB*.



ers annoyance and a consequent loss of sales for management," Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965), and other expenses, e.g., security, littering, maintenance, accident liability, and added insurance costs.

Just like the Postal Service's no solicitation policy at its Post Offices's nationwide, a private employer cannot be spending "considerable time and energy fitting competing demands for space and administering a program of permits and approvals." *United States v. Kokinda*, 110 S. Ct. 3115, 3124 (1990). Such considerable expense and regulation the Board would, by its order alone, compel all employers to endure without compensation. Preserving private property for the special use to which it has been dedicated has been protected by the Court.

In *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983), a non-certified union sought to use the internal school mail system. Access was denied by the Court because the union held no bargaining status, but also because the Court ruled the union's access was incompatible with the use of the school's property: "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* at 49. In fact, the Court confirmed that "alternate modes of access" were available to the union there, such as off-premises rallies and the media. *Id.* at 53-54.<sup>4</sup>

The public frequents retail establishments because of the substantial investment made to gain their patronage. The patrons believe that through the expenditure of considerable money and

---

<sup>4</sup>Inasmuch as a non-public forum requires scrutiny under the First Amendment and private property does not, the latter owner would be accorded greater protection "to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 46. See also 460 U.S. at 51 n.11, professing that an employer's exclusive property access rule for its certified union only is proper under the NLRA and, concomitantly suggesting, exclusionary access rules for stranger unions not improper under the NLRA.

effort, the establishment is a comfortable and convenient place to shop. If upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses or "run the gauntlet of most uncomfortable publicity, aggressive, and annoying importunity," *Truax*, 257 U.S. at 328, there will be a serious adverse impact on the store's normal sales activities.

Protection and recognition of these economic interests yields additional benefits. Given the virtually unlimited number of union groups, causes, and complaints (from area standards picketing, consumer boycotts, foreign product boycotts, war protests, civil rights protests, raffles, bake sales, J.A. 65-66, etc.) and the potentially divisive and inflammatory effect they would have on the consumer audience upon the employer's business property, the problem of "regulation," even in the "reasonable orders" the Board might possibly promulgate, becomes very serious. While the proposed rule *amicus curiae* advocates would not avoid that problem altogether, the mere fact that it would limit the number of such incursions to circumstances where no reasonable alternatives exist would render the problem manageable. This eliminates the legal hair-splitting and substitutes diversity for clarity.

This accommodation preserves the equal statutory and Constitutional right of the employer to express its views.<sup>5</sup> It also

---

<sup>5</sup>The First Amendment principle gleaned from the "Live Free or Die" motto of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977), "protects a person who refuses to allow use of his property as a marketplace for the ideas of others." *Id.* This right is extended to corporations as well. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Neither has Congress seen fit to silence employer free speech. See 29 U.S.C. § 158(c); *Bellotti*, 435 U.S. at 784-85 (the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak," especially where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing views to the public, the First Amendment is plainly offended.").



ensures "protection of the unwilling listener." *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988) (restriction on residential picketing upheld); *Breard v. City of Alexandria, LA*, 341 U.S. 622, 645 (1951) (community not required by the First Amendment "to admit soliciting of publications to the home premises of its residents"). Personal contact becomes the listener's option, not the speaker's.<sup>6</sup>

In the wake of massive informational and organizational efforts by the union against the Petitioner here, it is plainly obvious that many employees chose to exercise their personal right not to engage in representational activities with the union. Their avoidance of the union's efforts should not become the bootstrap to invoke a statutory right of access to them.<sup>7</sup>

---

Therefore, First Amendment interests are directly involved where the government "forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." *PruneYard Shopping Center v. Robbins*, 446 U.S. at 74, 98 (1974) (Powell, J.; concurring). This is because the public is likely to become confused by identifying the expression occurring on the property as the view of the owner. "The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 2044, cannot restore his 'right to refrain from speaking at all.'" *Id.* While *amicus* disagrees with the holding in *PruneYard*, that case involved a constitutional issue whereas the issue here is "dependent exclusively" on the NLRA. *Scott Hudgens*, 424 U.S. at 521.

<sup>6</sup>In fact, Lechmere received customer complaints about the union's leafletting on its property. J.A. 71, 96. These complaints cannot be ignored by a business without risking the loss of consumer confidence.

<sup>7</sup>The court of appeals also added that the employer failed to provide the union with the names and addresses of its employees - one more arrow in its appellate quiver. Pet. A-18. In light of the employees' primary interest in his/her name and address, the statement is but a prelude to the next chapter in coercive communications; unions have been filing §§ 8(a)(1) and (3) unfair labor practice charges against employers demanding employee names and addresses as of right, and the Board's General Counsel is waiting for the right case to make this precept law. See *Metro Care Services, Inc.*, 1990 N.L.R.B. GCM LEXIS 68 (Oct. 31, 1990) ("the instant cases do not present an appealing vehicle with which to

**C. THE PROPOSED BRIGHTLINE TEST TO PROTECT PRIVATE PROPERTY WHERE THE "USUAL MEANS" OF EMPLOYEE COMMUNICATION REMAINS OPEN, REQUIRES THE COURT TO REVISIT ITS RULINGS IN *SCOTT HUDGENS* AND *SEARS ROEBUCK & CO.* AND HARMONIZE THESE AUTHORITIES**

In both *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court addressed the less central right of unions to engage in area standards picketing on employer property. Considering the historical lessons learned in analyzing the many access cases decided by the Board under the Act, the principles enunciated in these two cases we believe should lead the Court to rethink both its rulings to closely parallel *Babcock & Wilcox*. See *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970) (new rule adopted in light of subsequent developments).

In *Scott Hudgens*, union picketers were removed from the parking lot and entrances to a shopping mall owned by Hudgens, in which the union had a primary dispute with one store located therein, Butler Shoe Co. The union filed a § 8(a)(1) charge against Hudgens. The Board found an unfair labor practice because members of the public were invited to do business within the mall and therefore it was "immaterial whether or not there existed alternative means of communicating with the customers and employees of the Butler store." *Id.* at 511. Demonstrating that unlike *Babcock & Wilcox* and *Central Hardware*, the activity in Hudgens involved "economic strike activity" carried out by Butler's own workers, but trespassing upon the property interests

---

attempt to extend the *Jean Country* principles to this area."); Pet. B-6 (the Board states: "the effectiveness of the Union's resorting to the Motor Vehicle Registry as a comprehensive source of the names and addresses of the Respondent's employees is patently minimal.").

of Hudgens, the Court refused to allow the Board to draw the line upon the existence alone of section 7 activity. The Court explained it had drawn a point "along the spectrum" between the LMRA right and the private property right, as setting forth a proper intellectual construct for an inquiry accommodating section 7 and the property rights.<sup>8</sup>

In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court upheld state court jurisdiction to enjoin the trespass by union area standards picketers upon employer property. In that case, the Court reviewed its *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware* decisions in reexplaining that the union shoulders a "heavy" burden in showing lack of alternative means to communicate with employees and that "trespassory organizational activity" should rarely be allowed. *Sears*, 436 U.S. at 205 (emphasis added).<sup>9</sup>

The Court also noted that access "has generally been denied except in cases involving *unique obstacles* to nontrespassory methods of communication with the employees," *Id.* at 205 n.41 (emphasis added), and that "[o]f course, if *Sears* had initiated the proceeding before the Board, the *location* of the picketing would have been entirely *irrelevant* and *no question of accommodation* would have arisen." *Id.* at 201 n.32 (emphasis added).

On its face, the Court's interpretation of the employer's right to protect its property by keeping off area standards picketers

---

<sup>8</sup>The accommodation reached by the Court in *Scott Hudgens* did not involve total strangers to Butler Shoe Co., since the economic picketers were from Butler's manufacturing operations rather than the sales store. Therefore, the accommodation made by the Court did not give the Board the green light to apply the "spectrum" analysis to cases involving complete stranger activities.

<sup>9</sup>See e.g., *NLRB v. Kutsher's Hotel & Country Club, Inc.*, 427 F.2d 200, 202 (2d Cir. 1970); *May Dep't Stores Co. v. NLRB*, 316 F.2d 797, 800 (6th Cir. 1963). Frequently, area standards picketing is simply another available means to organize non-union employer's, which the above quoted language recognizes.

and even non-employee organizers, is totally inconsistent with the Board's *Jean Country* jurisprudence set forth correctly by Petitioner.<sup>10</sup> Since nonemployee labor pickets cannot trespass, and given that the nonemployee pickets could communicate through picketing on nearby public property, the *Sears* Court ruled no accommodation was necessary.

However, the Court's endeavor to assure that the lack of federal preemption in *Sears* did not completely rule out Board participation in these cases if its jurisdiction were to be invoked by a party, led the Court to reclaim the fundamental difference between the right to organize to be a "core" right whereas area standards picketing was a right, but a lesser one. *Sears*, 436 U.S. at 206 n.42.

Although we perceive that the Court did not intend to establish two balancing tests, i.e., one access rule for organizational picketing and one for area standards picketing, the Board always treats both rights as superior to private property rights inasmuch as the Court indicated that union rights lay upon the "spectrum" indicated in *Scott Hudgens*. Consequently, in every known case, an employer's property right yielded to union access under *Jean Country*, except in three cases where the union interest was entirely remote, *Federated Dep't Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. (BNA) 1362 (1989) (no access where union attempts area standards pickets after the store is built); *Hardees Food Systems*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989) (no access where union has no Section 7 interest at all), or the union wants to block customer access, *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989) (with a dissent arguing for full access, on one store-one lot situation, union could not picket directly in front of store door, but could in the parking lot).

---

<sup>10</sup>The Court in *Sears*, explained that "in deciding the unfair labor practice question, the Board's *sole* concern would have been the objective, *not the location*, of the challenged picketing." 436 U.S. at 200 n.31 (emphasis added).



*Amicus* believes that in establishing a distinction in *Babcock & Wilcox* for nonmember organizers to gain access if alternate means of communication were not "available," the Court did not condone a separate rule for area standards picketers, which could allow greater access although they were engaging in a less-central right with "no such vital link to the employees located on the employer's property." *Sears*, 436 U.S. at 206 n.42. The rule attending each form of informational activity under the Act should be identical and uniform in both form and focus.

If nonemployee picketers cannot have property access in the organizational drive under *Babcock & Wilcox*, they should not be granted access when engaging in area standards picketing as well. The Board has proceeded repeatedly to the contrary.<sup>11</sup>

---

<sup>11</sup>*Sentry Markets, Inc. v. NLRB*, 914 F.2d 113 (7th Cir. 1990) (grocery store owner enjoined from removing economic boycott handbills of one product from its property); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) (economic strike picketing on 14th floor of office building necessary against third party property owner because union alleged it could not as effectively communicate outside of building entrance); *Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989) (union agent testifies that area standards picketing at perimeter less effective than at the front door); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325, 1327 (1989) (ULP picketing at edge of parking lot not "reasonable effective alternative means of communication"); *Dolgin's*, 293 N.L.R.B. No. 102, 2131 L.R.R.M. (BNA) 1159, 1162 (1989) (area standards handbilling ordered on company property because union could not distinguish between customers, "thereby reducing the effectiveness of the handbilling"); *Mountain Country Food Store*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329, 1330 (1989) (shopping center with three shops - because union product boycott message could not fit on one picket sign, picketing at parking lot entrance held "ineffective"); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331, 1333 (1989) (where nondiscriminatory access rule enforced by third party property owner - area standards picketing at lot entrance found "generally ineffective" because it would "substantially dilute" union message); *Butterfield Theaters*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113, 1116 (1988) (economic strike picketing at parking lot entrance simply "ineffective and/or unsafe").

A close review of the Court's decision in *Scott Hudgens*, reveals two other lines of thought. Returning to the Court's intent in *Babcock & Wilcox*, the Court stated that its holding there that "union organizers who seek to solicit for union membership may intrude on an employer's property if *no alternative means exist* for communicating with the employees." *Scott Hudgens*, 424 U.S. at 511. Focusing on the economic strike activity at hand in *Scott Hudgens* itself, the Court denied enforcement of the Board's order where the union's trespass was to be onto a *third party's property*. Between the results in *Babcock & Wilcox* and *Scott Hudgens*, there is little room for an accommodation except where physical access to workers is "*seriously handicapped*." *Republic Aviation*, 324 U.S. at 798.

*Amicus* believes that the Court never intended for the Board to have free reign to deny the results reached in the almost identical fact situations presented to the Court through the years.<sup>12</sup> The test for accommodation, then, only arises when workers are physically inaccessible to union organizers.

The Board's analysis here is therefore improper. Its utilization of *Jean Country*, 291 N.L.R.B. No. 4 (1988), taken in issue by all parties throughout these proceedings, is not a permissible test under the NLRA or the restrictions previously carved out in *Babcock & Wilcox* by the Court. Since organizational activity is an integral component of the Board's *Jean Country* test, the Court should note that the misapplication of the Court's tests has disabled employers from protecting their property rights. Like *Boys Market*, economic realities show that the balancing test

---

<sup>12</sup>In *Southern Servs., Inc.*, 300 N.L.R.B. No. 161, 136 L.R.R.M. (BNA) 1066 (1990), the Board determined that janitorial service workers could engage in organizational activity upon a third party customer's property in the face of the third party's non-solicitation rule. The Board found that *Babcock & Wilcox* was inapplicable and *Republic Aviation* applicable. It ignored the *Scott Hudgens* result that third party organizers and economic picketers have no right of access to property when the union workers had other means of communication. That case highlights the direction the Board intends to take its *Jean Country* case, see also footnote 7, *supra* at 12, which is a further reason for the Court's concern.



(like damages in *Boys Market*) must now be reversed. The Court should adopt as the proper test, the following:

Nonemployee union members shall have no right of access to an employer's property unless the union can demonstrate by objective evidence that it has no means available to communicate with employees because they work or live at locations inaccessible to the activist union members.

### CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court reverse the decision of the First Circuit and adopt the legal test enunciated above.

Respectfully submitted,

Gerard C. Smetana\*  
RICHMAN, LAWRENCE,  
MANN, GREENE &  
SMETANA  
Suite 2860  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 855-0300

*Of Counsel:*

Michael E. Avakian  
RICHMAN, LAWRENCE, MANN,  
GREENE & SMETANA  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 659-8687

Attorneys for Amicus Curiae  
Council on Labor Law  
Equality

May 9, 1991

\*Counsel of Record

(6)  
No. 90-970

Supreme Court, U.S.  
FILED

MAY 9 1991

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

LECHMERE, INC.,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit

**BRIEF OF AMICUS CURIAE FOR  
FOOD MARKETING INSTITUTE**

EUGENE D. ULTERINO\*  
Nixon, Hargrave, Devans  
& Doyle  
Clinton Square  
P.O. Box 1051  
Rochester, New York 14603  
Telephone: (716) 263-1000

Michel A. Hausknecht  
David P. Ford  
*Of Counsel*

\*Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
INTEREST OF AMICUS CURIAE .....	2
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	9
POINT I	
THE SUPREME COURT HAS ESTABLISHED THAT PROPERTY OWNERS CAN BE REQUIRED ONLY RARELY TO ALLOW NON-EMPLOYEE UNION ACTIVITY ON THEIR PROPERTY .....	9
POINT II	
THE BOARD'S DECISION IN THIS CASE IS ONE IN A SERIES OF RECENT BOARD DECISIONS THAT CANNOT BE RECONCILED WITH <u>BABCOCK &amp; WILCOX</u> AND ITS PROGENY .....	16
A. The Present Case Is Virtually Indistinguish- able Factually From <u>Babcock &amp; Wilcox</u> .....	16



B. <u>Jean Country</u> And Its Progeny Have Created, Almost Without Exception, A Permanent Easement For Unions On Private Retail Property .....	19
C. The Board Has Repudiated Principles Established In <u>Babcock &amp; Wilcox</u> .....	35
(1) The Board has rejected as nontrespasory alternatives the "usual methods of imparting information" .....	35
(2) The Board has failed to give sufficient weight to retailers' constitutionally-based property rights. It misapprehends the fact that retail property is open to the public .....	37

(3) The Board has required retailers to tolerate trespassing union representatives exercising the weakest Section 7 rights .....	44
(4) The Board has placed no temporal limits on easements granted union representatives .....	46
CONCLUSION .....	47

## TABLE OF AUTHORITIES

Cases:	Page
<u>Amalgamated Food Employees Union v. Logan Valley Plaza</u> , 391 U.S. 308 (1968).....	39
<u>Babcock &amp; Wilcox Co.</u> , 109 NLRB 485 (1954).....	passim
<u>Central Hardware Co. v. NLRB</u> , 407 U.S. 539 (1972).....	12,17,39,47
<u>D'Alessandro's, Inc.</u> , 292 NLRB No. 27, 130 LRRM 1089 (1988)..	45
<u>Dolgin's, a Best Company</u> , 293 NLRB No. 102, 131 LRRM 1159 (1989).....	23,30
<u>Fairmont Hotel</u> , 282 NLRB 139 (1986).....	13
<u>Giant Food Markets, Inc.</u> , 241 NLRB 727 (1979).....	46
<u>Granco, Inc.</u> , 294 NLRB No. 7, 131 LRRM 1325 (1989).....	24
<u>Hudgens v. NLRB</u> , 424 U.S. 507 (1976).....	12,44

Cases:	Page
<u>Jean Country</u> , 291 NLRB No. 4, 129 LRRM 1201 (1988).....	passim
<u>Kaiser Aetna v. U.S.</u> , 444 U.S. 164 (1979).....	40
<u>L&amp;L Shop Rite, Inc.</u> , 285 NLRB 1036, 126 LRRM 1151 (1987)....	45
<u>Lechmere, Inc.</u> , 295 NLRB No. 15, 131 LRRM 1480, enf., 914 F.2d 313 (1st Cir. 1990).....	passim
<u>Lloyd Corp. v. Tanner</u> , 407 U.S. 551 (1972).....	17,39
<u>Loretto v. Teleprompter Manhattan CATV Corp.</u> , 458 U.S. 419 (1982).....	40,47
<u>Monogram Models Inc.</u> , 192 NLRB 705 (1971).....	18
<u>Mountain Country Food Store, Inc.</u> , 292 NLRB No. 100, 130 LRRM 1329 (1989).....	22,23
<u>NLRB v. Babcock &amp; Wilcox Co.</u> , 351 U.S. 105 (1956).....	passim
<u>Pruneyard Shopping Center v. Robins</u> , 447 U.S. 74 (1980)....	41,42,43

Cases:	Page
<u>Red Food Stores, Inc.</u> , 296 NLRB No. 62, 132 LRRM 1164 (1989)...	passim
<u>Richway, a Division of Federated Dept. Stores, Inc.</u> , 294 NLRB No. 49, 131 LRRM 1362 (1989)...	28,29
<u>Sears, Roebuck &amp; Co. v. San Diego County Council of Carpenters</u> , 436 U.S. 180 (1978).....	passim
<u>Sentry Markets, Inc.</u> , 296 NLRB No. 5, 132 LRRM 1001 (1989), <u>enf. gr.</u> , 914 F.2d 113 (7th Cir. 1990).....	24,25,36
<u>Smitty's Supermarket, Inc.</u> , 284 NLRB 1188, 125 LRRM 1268 (1987).....	45
<u>Target Stores</u> , 292 NLRB No. 93, 130 LRRM 1331 (1989).....	21,22,30
<u>Target Stores</u> , 300 NLRB No. 136 (1990).....	25,29,30
<u>Tecumseh Food Land</u> , 294 NLRB No. 37, 131 LRRM 1365 (1989)...	27,28
<u>Wegmans Food Markets, Inc.</u> , 300 NLRB No. 114 (1990).....	passim

Cases:	Page
<b><u>Other Authorities</u></b>	
National Labor Relations Act, § 7.....	passim
<u>Labor Law - Employees' Right to Organize - First Circuit Upholds NLRB Order Granting NONEMPLOYEE Organizers Access To Retail Store's Parking Lot</u> , 104 HARV. L. REV. 1407.....	18



No. 90-970

---

In the  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

---

LECHMERE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

---

On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit

---

**BRIEF OF AMICUS CURIAE FOR  
FOOD MARKETING INSTITUTE**

---

The Food Marketing Institute ("FMI") respectfully submits this brief as amicus curiae in support of Petitioner. The written consent of the parties for submission of this brief has been obtained and

filed with the Clerk of the Court, pursuant to Rule 37.3 of the Rules of this Court.

**INTEREST OF THE AMICUS CURIAE**

The broad question before the Court is whether union representatives have a right to trespass on private property to engage in activity protected by Section 7 of the National Labor Relations Act ("Act" or "NLRA"). The National Labor Relations Board ("Board" or "NLRB") determined in the present case that union representatives could not be excluded lawfully from the parking lot and other exterior areas of Petitioner's retail store. Lechmere, Inc., 295 NLRB No. 15, 131 LRRM 1480, enf., 914 F.2d 313 (1st Cir. 1990). The Board's decision is one of a series of recent cases requiring retail store owners to open their

property to union representatives intent, in some instances, on nothing more lofty than injuring their businesses.

As an organization representing almost 19,000 retail food stores from around the country, FMI is deeply concerned by the Board's failure to recognize the important interests that food and other retail store operators have in maintaining a positive environment for consumers.<sup>1/</sup> Many FMI members have well-established policies prohibiting or strictly limiting non-business-related activities on their property, much like Petitioner's policy prohibiting all solicitation on its premises.

---

<sup>1/</sup> FMI is a non-profit association of 1,600 food retailers and wholesalers operating approximately 19,000 retail food stores. Their combined annual sales volume of approximately \$180 billion represents more than half of all grocery sales in the United States. The retail membership includes large multi-store chains, small regional chains, and independent supermarkets.

FMI members have found that consumers are more inclined to shop, and to shop often, when the retail food store and its environs are attractive and friendly places. Food retailing is a highly competitive, low-margin business depending on volume and repeat business to make the difference between success and failure. Survival in this industry depends, in great part, on a retailer's ability to offer consumers a convenient, pleasant, and friendly shopping experience. If a store fails to meet these expectations, consumers will take their business to the store across the street or down the road.

FMI members invest substantial resources to create and maintain inviting environments for consumers. Their ability to control how, and by whom, their property is used is crucial to maintenance of an appealing

shopping environment. The Board's decision in this and other recent cases involving retail establishments trammel property rights in a manner never contemplated by the Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

On behalf of its members, FMI urges the Court to reject, as it has in the past, the Board's failure to respect the constitutionally-based rights of private property owners who open their property to the public for commercial purposes alone.

#### SUMMARY OF ARGUMENT

By enforcing the Board's order against Petitioner, the First Circuit Court of Appeals affirmed the Board's repudiation of principles first established by the Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105



(1956). The Court established the guiding principle in Babcock & Wilcox that access to private property can be denied union representatives "if reasonable efforts by the union through other available channels of communication will enable it to reach [its audience] . . . ." 351 U.S. at 112. It then rejected the Board's ruling that a factory owner could not lawfully remove union organizers from its property.

Twenty-two years later, in Sears, Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180, 205 n. 41 (1978), the Court explained for the first and only time the results it expected to flow generally from Babcock & Wilcox -- access to private property would be required only in "cases involving unique obstacles to non-trespassory methods of communication."

Although Petitioner's case is substantially similar factually to Babcock & Wilcox, the Board relied on its formulation of the issues in Jean Country, 291 NLRB No. 4 (1988), to find that Petitioner violated the Act by insisting that union organizers leave its property. The Circuit Court accepted Jean Country as a permissible interpretation of the Court's Babcock & Wilcox principles, despite the fact that application of Jean Country to private retail property has created, virtually without exception, a permanent easement for union representatives to communicate face-to-face with their target audiences.

The Board has turned Babcock & Wilcox on its head and made union access to private property the rule, rather than the exception. In the process, the Board has rejected all of the "usual methods of

imparting information" in late twentieth century America which do not entail trespassing on private property, including those specifically approved in Babcock & Wilcox, 351 U.S. at 107, 112.

The Board has also failed to accord sufficient weight to the retailer's constitutionally-based property rights. It consistently misapprehends the fact that private retail property is open to the public. The Board's consequent "taking" of the private retail property owner's right to exclude violates the Fifth Amendment because it unreasonably impairs the retailer's business use of its property without just compensation. That the "taking" has been exercised on behalf of the weakest Section 7 rights, and in all cases without temporal limitation, only emphasizes further the constitutional infirmity of the Board's

post-Jean Country decisions. The Court must restore the proper balance between property rights and Section 7 rights, and reverse the decision of the First Circuit Court of Appeals.

#### ARGUMENT

##### POINT I

THE SUPREME COURT HAS ESTABLISHED THAT PROPERTY OWNERS CAN BE REQUIRED ONLY RARELY TO ALLOW NON-EMPLOYEE UNION ACTIVITY ON THEIR PROPERTY.

The Supreme Court first considered whether union representatives could lawfully be excluded from private property in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). A union sought to distribute leaflets to workers within a private factory parking lot. Because the union's organizing activity was protected by Section 7 of the Act, the Board ruled that the factory owner

could not lawfully remove the organizers from its property. Babcock & Wilcox Co., 109 NLRB 485 (1954).

The Court rejected the Board's decision, declaring:

It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

351 U.S. at 112. The Court went on to explain that the "usual methods of imparting information are available. The various instruments of publicity are at hand." 351 U.S. at 113. The Court mentioned specifically that the union could reach employees by sending literature through the mail, and by speaking with them in their homes, on the

public streets, and by telephone. 351 U.S. at 107. Under these circumstances, the Court found no basis in the Act to compel the employer to allow union representatives on its property to distribute literature and speak with employees. 351 U.S. at 112.

During the thirty-five years since its Babcock & Wilcox decision, the Court has not departed from the guiding principle that access to private property can be denied union representatives "if reasonable efforts by the union through other available channels of communication will enable it to reach [its audience] . . ." 351 U.S. at 112. Nor has the Court indicated that a union is entitled to trespass on private property when alternatives such as the mails, telephone calls, meetings, and the media are available to reach its target



audience.<sup>2/</sup> To the contrary, in Sears, Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180 (1978), the Court discussed for the first and only time the results it expected to flow from Babcock & Wilcox -- that union access to private property would be very much the exception and not the general rule. 436 U.S. at 205.

In Sears, the Court considered whether the NLRA preempted a state court injunction against a union's trespassory "area

---

<sup>2/</sup> In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), the Court rejected application of First Amendment principles to the question of whether union organizers could be excluded from a retail store's parking lot. The Court remanded the case to the Board with instructions to apply the principles from Babcock & Wilcox. Four years later, in Hudgens v. NLRB, 424 U.S. 507 (1976), the Court instructed the Board to apply Babcock & Wilcox principles to economic strike-related picketing as another example of activity protected by Section 7. In neither case did the Court suggest how the accommodation between property rights and Section 7 rights should be struck, nor whether there were alternative channels of communication available to the union.

standards" picketing. It found no federal preemption of state court jurisdiction.

The Court evaluated the union's trespassory picketing under Babcock & Wilcox to determine whether it was protected by Section 7. Although it was not essential for the Court to resolve this issue definitively, and it did not purport to do so, the Court's ultimate conclusion rested firmly on its opinion that trespassory activity is only rarely protected by Section 7.<sup>3/</sup> The Court explained:

---

<sup>3/</sup> The Circuit Court's suggestion in Lechmere that the Supreme Court's holding in Sears turned on the relatively weak Section 7 right involved is a post hoc rationalization. 914 F.2d at 319-320. Although the Supreme Court doubted that area standards activity was entitled to the same measure of protection as organizing activity, the Court assumed, for the purposes of its decision, "that picketing to enforce area standards is entitled to the same deference in the Babcock accommodation analysis as organizational solicitation. . ." 436 U.S. at 206. Only recently has the Board recognized explicitly that area standards activity does not "lie at the very core" of the Act. 436 U.S. at 206, n. 42; Fairmont Hotel, 282 NLRB 139, 143 (1986).

[W]hile there are unquestionably examples of trespassory activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.

Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.

436 U.S. at 205.<sup>4/</sup>

---

<sup>4/</sup> The Circuit Court's suggestion to the contrary in Lechmere notwithstanding (914 F.2d at 320 n. 5), the Court was not merely reinforcing in Sears that the trespasser bore the burden of proving the lack of reasonable nontrespassory alternatives. It was very important to the Court's holding that "the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct . . . ." 436 U.S. at 207.

The Court's decisions in Babcock & Wilcox and Sears, taken together, establish that private property owners can be required to allow union representatives on their property only in "cases involving unique obstacles to nontrespassory methods of communication." Sears, 436 U.S. at 205, n. 41. An employer "must allow [a] union to approach his employees on his property" only "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." Babcock & Wilcox, 351 U.S. at 113. These principles are repudiated by the Board's decision in this case.

POINT II

THE BOARD'S DECISION IN THIS CASE IS ONE IN A SERIES OF RECENT BOARD DECISIONS THAT CANNOT BE RECONCILED WITH BABCOCK & WILCOX AND ITS PROGENY.

A. The Present Case Is Virtually Indistinguishable Factually From Babcock & Wilcox.

The present case arose, like Babcock & Wilcox, because an employer enforced its non-discriminatory no-solicitation policy against union organizers attempting to distribute leaflets to employees in its parking lot. The union also used mailings, telephone calls, and home visits in its efforts to enlist employee support, as did the union in Babcock & Wilcox. Lechmere, 914 F.2d at 327 (Torruella, J., dissenting). In addition, the union placed five advertisements in a local daily newspaper distributed in the area where most employees lived, and it

distributed handbills and displayed picket signs from public property adjacent to Petitioner's property. Id.

Notwithstanding the marked similarity between the facts of this case and the facts in Babcock & Wilcox, the Board ruled that Petitioner violated Section 8(a)(1) of the Act by insisting that the union organizers leave its property.<sup>5/</sup> The Board rejected

---

<sup>5/</sup> Although Babcock & Wilcox involved the parking lot of a manufacturing plant, and the present case involves the parking lot of a retail store, there is no significance to this distinction. In both cases, the employers undertook to control and limit non-commercial activities on their properties through non-discriminatory policies prohibiting solicitation and distribution. Babcock & Wilcox, 351 U.S. at 107; Lechmere, 914 F.2d at 316. Moreover, there was no finding by the Board in either case that the employer tolerated any non-business-related activities on its property. That Petitioner's property is open to the public for the purpose of shopping and related activities does not cause it to lose its private character. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972); cf., Central Hardware Co. v. NLRB, 407 U.S. at 547. It is also not



the entirely satisfactory "instruments of publicity at hand" in Babcock & Wilcox (351 U.S. at 113), thereby repudiating the guiding principle of Babcock & Wilcox "that the employer's right to exclude must yield only 'when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them.'" Note, Labor Law - Employees' Right to Organize - First Circuit Upholds NLRB Order Granting Nonemployee Organizers Access To Retail Store's Parking Lot, 104 HARV. L.

(continued from previous page)

5/ significant that the employees in Babcock & Wilcox lived in a relatively undeveloped area while Petitioner's employees live in a highly developed, urban-suburban area. Monogram Models Inc., 192 NLRB 705 (1971) (Board declined to apply different rules for big cities and small towns in applying Babcock.) In both cases, the unions had documented success reaching the same percentage of targetted employees. Lechmere, 914 F.2d at 327 (Torruella, J., dissenting).

REV. 1407, quoting Babcock & Wilcox, 351 U.S. at 112.

In this case, the Board not only made no effort to distinguish Babcock & Wilcox factually, it failed to even mention Babcock & Wilcox in its decision. The Board, instead, relied exclusively on its formulation and analysis of the issues described in Jean Country, 291 NLRB No. 4, 129 LRRM 1201 (1988). It is to this formulation, and its application, that we now turn.

B. Jean Country And Its Progeny Have Created, Almost Without Exception, A Permanent Easement For Unions On Private Retail Property.

The Board's Jean Country analysis purportedly combines a careful evaluation of an extensive array of factors related to the conflicting Section 7 and property rights presented in the particular case, with an

examination of the nontrespasory communication alternatives available to the union. Jean Country, 129 LRRM at 1204-1205. The Board explained that "in all cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." 129 LRRM at 1205.

In reality, the Board's formulation in Jean Country and its subsequent application to this and other cases involving retailers repudiates the guiding principles from Babcock & Wilcox. The Board has created, virtually without exception, a permanent easement for unions on private retail property which allows them face-to-face contact with their target audiences in the most convenient and least costly locations.

A review of the Board's post-Jean Country cases where the retailer possessed an enforceable property interest in its parking lot and adjacent areas will illustrate how very far the Board has strayed from the path laid down by the Court in Babcock & Wilcox and its progeny.

In Target Stores, 292 NLRB No. 93, 130 LRRM 1331 (1989), union representatives were entitled to picket and to distribute area standards handbills asking consumers to boycott a retail store because it was using a non-union maintenance contractor. Access to the entrance of the store was required notwithstanding that the retailer enforced a broad no-solicitation rule and that area standards activities are not core Section 7 activities. 130 LRRM at 1333. The retailer's property rights were weak because the "general public is invited to patronize"

the store. Id. The only nontrespassory communication alternatives considered by the Board were picketing and handbilling at the perimeter of the property. Id. They were rejected. Id.

In Mountain Country Food Store, Inc., 292 NLRB No. 100, 130 LRRM 1329 (1989), union representatives were entitled to stand immediately in front of several retail food stores and distribute handbills asking consumers to boycott Coca Cola products distributed by a bottling company it was striking. Although the retailer maintained a broad no-solicitation policy, its property rights were weak because the property was "essentially open to the public." 130 LRRM 1330. The only nontrespassory communication alternative evaluated by the Board was handbilling consumers from the perimeter of the property. 130 LRRM at 1330. This "only

possible reasonable alternative" was rejected. Id.

In Dolgin's, a Best Company, 293 NLRB No. 102, 131 LRRM 1159 (1989), union representatives were entitled to picket and to distribute area standards handbills asking consumers to boycott the retailer because it was using non-union contractors for remodeling. Access to the front entrances of several of the retailer's stores was required notwithstanding that the retailer excluded all soliciting from its parking lots, and that area standards activity was involved. 131 LRRM 1161. Property rights were weak because the property was "generally held open to the public." Id. The Board considered no alternative beyond handbilling consumers from the perimeter of the property. Id. This alternative was rejected. Id.



In Granco, Inc., 294 NLRB No. 7, 131 LRRM 1325 (1989), union representatives were entitled to picket and to distribute handbills asking consumers to boycott a retail store because it failed to remedy several alleged unfair labor practices. Access to the store's entrance was required notwithstanding that the union picketed and handbilled in an immediately adjacent public area and in areas designated by the retailer near the store. 131 LRRM at 1327. The Board considered no other alternatives.

In Sentry Markets, Inc., 296 NLRB No. 5, 132 LRRM 1001 (1989), enf. gr., 914 F.2d 113 (7th Cir. 1990), union representatives were entitled to distribute handbills asking consumers to boycott meat products distributed by a company it was striking. Access to the food store's entrance was required notwithstanding that nontrespassory

alternatives such as newspaper advertising, direct mail, and hand delivery in adjacent neighborhoods were readily available, and that there was picketing on public property adjacent to the entrance of the property. 132 LRRM at 1004. The food retailer prohibited all solicitation on its property, except by the Salvation Army during the holiday season. 132 LRRM at 1003-1004.

In Target Stores, 300 NLRB No. 136 (1990), union representatives were entitled to stand immediately in front of two of the retailer's three stores and distribute area standards handbills urging a consumer boycott because it was using non-union contractors for remodeling. Access was required notwithstanding that the retailer excluded all soliciting from its property and that area standards activity was involved. Property rights at both locations

were weak due to the "open and public nature" of the properties. The only alternative the Board considered was handbilling consumers from the perimeter of the property. It rejected this alternative.

In Wegmans Food Markets, Inc., 300 NLRB No. 114 (1990), union representatives were entitled to stand at the entrance to a retail food store and distribute handbills urging customers to boycott the non-union store in favor of stores employing the union's members. Access was required notwithstanding that the union had used nontrespassory handbilling, direct mail, telephone calls, and lawn signs to reach the food retailer's customers in other communities, and that newspaper, radio, television, and bus advertising were also readily available. 300 NLRB No. 114, slip. op. ALJ dec. at 5, 12. The food retailer's "property

rights [did] not weigh heavily" because the property "is open to the public . . ." 300 NLRB No. 114, slip. op. ALJ dec. at 10.

On the other side of the ledger of retail store cases are four cases which present circumstances so unique that they do not undercut FMI's contention that the Board has established an easement for union representatives on private retail property.

In Tecumseh Food Land, 294 NLRB No. 37, 131 LRRM 1365 (1989), the union was not entitled to position five representatives in a small, twelve-foot square area in the food store's immediate entrance because their location tended to impede access to the store. 131 LRRM at 1367. The food store had already permitted union representatives to distribute area standards handbills and to picket elsewhere on its property. 131 LRRM at 1366. This case stands only for the

proposition that a union has no Section 7 right to physically interfere with a retail store's patrons. The Board indicated it would not have allowed the food store to exclude the union altogether. It stated that a "proper balancing of the parties rights here would permit the Union to distribute its handbills in some manner and at some place on the property." 131 LRRM at 1367.

In Richway, a Division of Federated Dept. Stores, Inc., 294 NLRB No. 49, 131 LRRM 1362 (1989), union representatives were not entitled to stand in front of two newly-constructed retail stores and distribute area standards handbills protesting non-union contractors no longer on the site. 131 LRRM at 1365. The Board was persuaded by an absence of evidence that the retailer had any ongoing relationship with the

primary employer with whom the union had its dispute. 131 LRRM at 1364. This case establishes, at most, that a retailer need not tolerate union trespassing when it has no relationship with the primary employer.<sup>6/</sup>

In Target Stores, 300 NLRB No. 136 (1990), another exceptional case, union representatives were not entitled to distribute area standards handbills to consumers in front of a retailer's leased store. The Administrative Law Judge ordered the retailer to allow union access to two of its properties (discussed *infra* at 25), but he did not impose the same burden on the landlord for the retailer's third store because the General Counsel failed to negate

---

<sup>6/</sup> It might also have been significant to the Board that the union's activity, itself, may have violated the Act. 131 LRRM at 1363.



testimony that a large grassy area on the public property close to the shopping center's entrance was an appropriate site for reaching consumers. Although the retailer challenged the Judge's order requiring access to the stores it owned, there was no appeal from the Judge's ruling on the third store. 300 NLRB No. 136, slip. op. at 1 fn. 2. The Board affirmed the ruling against the retailer, but it also took pains to distance itself from the Judge's latter ruling. Id. When compared to the Board's own rulings in factually similar cases, this aspect of Target Stores is aberrant. Compare, Target Stores, 292 NLRB No. 93; Dolgin's, 293 NLRB No. 102; Wegmans Food Markets, Inc., 300 NLRB No. 114.

In Red Food Stores, Inc., 296 NLRB No. 62, 132 LRRM 1164 (1989), union representatives were not entitled to engage in area

standards picketing or handbilling in front of three retail food stores. Although at first glimpse this case might suggest that Jean Country did not establish a per se rule granting union representatives an easement on private retail property, unique facts and the Board's subsequent decision in Wegmans Food Markets combine to leave the rule intact.

In Red Food Stores, the union was purportedly protesting the food retailer's payment of low wages and its foreign ownership. The union admitted, however, that it did not know whether the retailer's wages were below area standards (they were not). 132 LRRM at 1168. Chairman Stephens concluded that the union was not engaged in area standards activity protected by Section 7. 132 LRRM at 1168. Stephens also concluded that the union's attack on the

retailer's foreign ownership was unprotected. 132 LRRM at 1168. Absent any activity protected by Section 7, Stephens concluded that the union could be excluded lawfully from the food retailer's property. 132 LRRM at 1168.

The Board majority did not share Chairman Stephens' concerns. They were persuaded, however, by the union's extensive television ad campaign and some picketing and handbilling on public property adjacent to the stores. They found these nontrespassory communication alternatives sufficient to justify denying the union access to consumers in front of the stores. 132 LRRM at 1167-1168.

Any hope raised by Red Food Stores for an objective, reasoned evaluation by the Board of a union's Section 7 rights and the nontrespassory communication alternatives

available to it were promptly dashed by its next decision involving a food retailer. In Wegmans Food Markets, Inc., 300 NLRB No. 114 (1990), the union tried to distribute two separate handbills to the retail food store's customers. 300 NLRB No. 114, slip. op. ALJ dec. at 6. The first asked patrons to boycott the store in favor of certain unionized stores. Id. The second handbill asked shoppers to complain to the retailer because its prices were allegedly higher in their community than in others. Id. The retailer contended that the union's distribution of the second handbill was not protected by Section 7, and that it weakened sufficiently the union's already weak Section 7 right to distribute the first handbill. The Board declined to consider whether distribution of the second handbill was unprotected. 300 NLRB No. 114, slip.

op. at 1 fn. 2. Following Red Food Stores and Wegmans, it appears that retailers must tolerate any merely colorable Section 7 activity on their property.

The Board majority's holding in Red Food Stores, premised on the union's actual reliance on nontrespassory communication alternatives, is also seriously undercut by Wegmans. The union in Wegmans relied extensively on nontrespassory handbilling, direct mail, telephone calls, and lawn signs to communicate its "boycott non-union" message to the food retailer's customers in several communities. 300 NLRB No. 114, slip. op. ALJ dec. at 5. The union declined to pursue any of these options in the community served by the store in question. Id. The Board rejected the food retailer's contention that the union's continued reliance on nontrespassory communication

alternatives permitted, as did the union's media campaign in Red Food Stores, denial of access to the union. 300 NLRB No. 114, slip. op. ALJ dec. at 12. Following Wegmans, it appears that the Board will no longer consider a union's sustained reliance on nontrespassory communication alternatives when evaluating whether union representatives must be given access to private retail property. The Board's hostility to nontrespassory communication alternatives could not be more manifest.

C. The Board Has Repudiated Principles Established In Babcock & Wilcox.

- (1) The Board has rejected as nontrespassory alternatives the "usual methods of imparting information."

The Board has consistently ignored the guiding Babcock & Wilcox principle that union access to private property may be



denied where the "usual methods of imparting information are available." 351 U.S. at 113. The Board has rejected virtually all of the "usual methods of imparting information" in late twentieth century America. In the present case, the Board rejected Petitioner's contention that the union could reach employees through the mails, telephone calls, and by personal contact at home. 131 LRRM at 1482. These were, however, the same alternatives sufficient in Babcock & Wilcox to avoid destruction of the employees' Section 7 right to self-organization. 351 U.S. at 111. In other cases, most notably Sentry Markets and Wegmans Food Markets, the Board has rejected all remaining "usual methods of imparting information."

- (2) The Board has failed to give sufficient weight to retailers' constitutionally-based property rights. It misapprehends the fact that retail property is open to the public.

The Board has failed to accord any significance to the retailer's right as a property owner or leaseholder to exercise, in furtherance of its legitimate business interests, one of the most treasured strands in its bundle of property rights - the right to exclude. The Board consistently misapprehends the fact that retail store property is open to the public.

The retailer's invitation to the public is limited to activities which it believes are beneficial to its commercial purposes. The "public" is neither invited nor permitted to engage in an infinite array of activities on the retailer's property.

Creation and maintenance of a friendly, inviting environment is important to many retailers, particularly food retailers. It is for this reason that many retailers expend considerable resources on the appearance of their property and exercise strict control over how, and by whom, their property is used. Crowds of union representatives and others pursuing their own causes in the entrance areas of food and other retail stores by their mere presence and demeanor discourage shoppers and injure the retailer.<sup>1/</sup> Non-discriminatory no-solicitation policies are maintained to protect the retailer from this injury. For these reasons, the retail property owner's right to exclude is at least as compelling

---

<sup>1/</sup> This is the union representatives' intention, typically, separate and apart from the quality or persuasiveness of their message.

as that of the private factory owner whose business is not harmed by union representatives on its property. The Board's rulings, however, accord no greater respect to the rights of the retail store located on private property than the retailer fronting a city sidewalk.

The Board's rulings since Jean Country notwithstanding, modern private retail shopping centers and stores are not the functional equivalents of our Nation's city streets. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Court rejected the Board's previous efforts to resurrect Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) in Central Hardware Co. v. NLRB, because "it would . . . constitute an unwarranted infringement of long settled rights of private property protected by the

Fifth and Fourteenth Amendments." 407 U.S. at 547. The Court must do so again.

The Board's ruling in this and other post-Jean Country cases create a broad exception to the general rule that a private property owner may control by whom, and for what purposes, its property is used. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). The Court has recognized that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Id. The Court has also recognized that the property owner's right to exclude falls within the category of interests that the government cannot take without compensation. Kaiser Aetna v. U.S., 444 U.S. 164, 179-80 (1979). The Board has, thus, not only misapprehended the significance of this particular right to retail

property owners, it has violated the due process clause of the Fifth Amendment by establishing easements for union representatives on private retail property.

Whether government restriction of the right to exclude solicitors from private property constitutes a "taking" for which just compensation is due was addressed by the Court in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). The state court had construed its constitution to require a private shopping center to permit high school students to distribute literature and solicit support for their petitions. In analyzing whether there had been a Fifth Amendment "taking," the Court observed that one of the essential sticks in the bundle of private property rights is the right to exclude others. 477 U.S. at 82. It then



explained that there literally had been a "taking" of that right because of the state court's ruling that citizens were entitled to exercise free expression rights on shopping center property. Id.

The Court then stated that not every destruction or injury to property by governmental action is a "taking" in the Constitutional sense. Id. To determine whether a government regulation amounts to a "taking," there must be an examination "into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." 477 U.S. at 83. Examining these factors in the case before it, the Court concluded there was not an unconstitutional infringement of the shopping center owners' property rights because "[t]here is

nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." Id.

The facts in Pruneyard Shopping Center stand in stark contrast to the present case and others like it where the Board has ordered the retailer to allow union representatives to picket and distribute handbills directly in front of its store. The Board's "taking" unreasonably impairs the retailer's business use of its property because it damages the appealing environment that the retailer has invested substantial sums to create.<sup>8/</sup>

---

<sup>8/</sup> The Board's order requiring a food retailer to allow "boycott non-union" handbilling at its front door is perhaps the clearest example of an unconstitutional "taking" by the Board. See, Wegmans Food Markets, 300 NLRB No. 114. The union's express purpose is to damage the retailer's business by discouraging consumers from shopping there. A more immediate impairment of the retailer's reasonable investment-backed expectations cannot be imagined.

- (3) The Board has required retailers to tolerate trespassing union representatives exercising the weakest Section 7 rights.

The Board's Jean Country analysis in the retail store context has consistently disregarded the Court's admonition that "the locus . . . of accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the . . . §7 rights . . ." (Hudgens, 424 U.S. at 522) by according the very weakest Section 7 rights treatment equal to those lying "at the very core" of the Act. Sears, 436 U.S. at 206 n. 2. The Board has required private property rights to yield to all Section 7 activities, irrespective of whether they address concerns which lie at the core of the Act. Retailers have had their properties burdened no less extensively by area

standards and "boycott non-union" activities than by core Section 7 activities like union organizing and economic strike activities. Perhaps the most egregious example can be found in Wegmans Food Markets, 300 NLRB No. 114, where the Board assumed that only half of the union's consumer boycott activity was protected by Section 7. It nonetheless required the food retailer's property rights to yield to activity of only tangential concern to the Act.<sup>9/</sup>

---

9/ The Court explained in Sears why it imagined that area standards activity aimed at provoking a consumer boycott was not "at the very core of the . . . NLRA . . ." 436 U.S. at 206 n. 42. Union activity to induce a consumer boycott of a retailer because its employees have not selected the union to represent them is still farther out on the fringes of Section 7. First, this type of activity has only recently been recognized as a Section 7 right. D'Alessandro's, Inc., 292 NLRB No. 27, 130 LRRM 1089 (1988); L&L Shop Rite, Inc., 285 NLRB 1036, 126 LRRM 1151 (1987); Smitty's Supermarket, Inc., 284 NLRB 1188, 125

(continued next page)

- (4) The Board has placed no temporal limits on easements granted union representatives.

In Jean Country and its progeny, there are no temporal limitations on the easements granted union representatives by the Board. Petitioner may, for example, be compelled to endure union organizers on its property until they tire of the activity, if ever. In some instances, it can be expected that

---

(continued from previous page)

- 9/ LRRM 1268 (1987). Second, unlike area standards activity, the union engaged in a "boycott non-union" campaign has no dispute with the target employer. Compare, Giant Food Markets, Inc., 241 NLRB 727 (1979). The union's dispute is really with the retailer's employees who have exercised their Section 7 right to speak for themselves. Moreover, to the extent the union's consumer boycott is successful, employees of the retailer risk decreased pay and benefits, or loss of employment, because they have chosen to remain non-union. Thus, not only are the Section 7 protections in this instance extremely attenuated, the union's actions trammel both the retailer's property rights and the Section 7 rights of its employees.

union representatives will remain for years at a time. In Wegmans Food Markets, for example, the retailer has been the target of steady "boycott non-union" handbilling and related activities for three years with no signs of waning.

It was contemplated by the Court that the "yielding of property rights" required by Babcock & Wilcox would be both "temporary and minimal." Central Hardware v. NLRB, 407 U.S. at 545; Loretto, 458 U.S. at 435 n.12. There is nothing in the Board's Jean Country formulation or in any of its resultant decisions which recognizes this principle.

#### CONCLUSION

For the foregoing reasons, the Court should restore the balance between property rights and Section 7 rights carefully struck



in Babcock & Wilcox and reverse the decision  
of the First Circuit Court of Appeals  
enforcing the Board's order.

Dated: May 8, 1991      Respectfully submitted,

EUGENE D. ULTERINO  
NIXON, HARGRAVE, DEVANS  
& DOYLE  
Clinton Square  
P.O. Box 1051  
Rochester, NY 14603  
(716) 263-1000

9  
No. 90-970

Supreme Court, U.S.  
FILED

MAY 9 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,

v.

*Petitioner,*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA AND THE  
INTERNATIONAL MASS RETAIL ASSOCIATION  
AS *AMICI CURIAE* SUPPORTING PETITIONER

*Of Counsel:*

STEPHEN A. BOKAT

MONA C. ZEIBERG

NATIONAL CHAMBER

LITIGATION CENTER

1615 H Street, N.W.

Washington, D.C. 20062

(202) 463-5337

JOHN S. IRVING

Counsel of Record

KIRKLAND & ELLIS

655 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 879-5000

*Attorney for the*

*Chamber of Commerce of the*

*United States of America*

ROBERT J. VERDISCO

INTERNATIONAL MASS RETAIL ASSOCIATION

1901 Pennsylvania Avenue, N.W.

10th Floor

Washington, D.C. 20006

(202) 861-0774

## TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT .....	3
BACKGROUND .....	5
I. JEAN COUNTRY MATERIALLY ALTERS BABCOCK & WILCOX AND THEREBY FRUSTRATES EMPLOYERS' EFFORTS TO VINDICATE THEIR PROPERTY INTER- ESTS IN A TIMELY MANNER .....	7
A. Despite The Express Distinction Drawn In <i>Babcock &amp; Wilcox</i> , The Board Continues To Confuse The Section 7 Rights Of Employees With Those Of Nonemployees .....	8
B. <i>Jean Country</i> Misplaces The Alternative Means Factor Held To Be A Threshold In- quiry In <i>Babcock &amp; Wilcox</i> And Its Progeny..	9
C. <i>Jean Country's</i> View Of Alternative Means Distorts <i>Babcock &amp; Wilcox</i> .....	12
D. <i>Jean Country</i> Devalues Employers' Property Interests .....	14
II. IN LIGHT OF PREEMPTION PRINCIPLES, JEAN COUNTRY DRAMATICALLY RE- DUCES EMPLOYERS' PROSPECTS OF OB- TAINING MEANINGFUL VINDICATION OF THEIR PRIVATE PROPERTY INTERESTS..	15
A. Justice Powell's Fears That Employers Would Be Foreclosed From Interim Relief From Union Trespassing Have Been Real- ized .....	15
B. <i>Jean Country</i> Sacrifices Employers' Property Interests .....	20
C. The General Counsel And The Board Have Discouraged Employers From Seeking State Court Injunctive Relief, Thus Fostering Employer Reliance On The Ineffective <i>Jean</i> <i>Country</i> Test .....	22
D. The Board Is Due No Deference .....	25
CONCLUSION .....	26



## TABLE OF AUTHORITIES

Cases:	Page
<i>Amalgamated Employees Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968)....	14
<i>American Pacific Concrete Pipe Co.</i> , 292 NLRB No. 133, 130 LRRM (BNA) 1501 (1989) .....	24
<i>Bill Johnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983) .....	23
<i>Brown Jug, Inc. v. International Broth. of Teamsters, Local 959</i> , 688 P.2d 932 (Alaska 1984)....	17
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	10
<i>Cross Country Inn, Inc. v. South Cent. Dist. Council</i> , 50 Ohio App. 3d 8, 552 N.E.2d 232 (1989)....	5, 17
<i>Dolgin's, A Best Co.</i> , 293 NLRB No. 102, 131 LRRM (BNA) 1159 (1989) .....	7
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	9
<i>Fairmont Hotel Co.</i> , 282 NLRB 139 (1986) .....	6, 9
<i>Giant Food Stores, Inc.</i> , 295 NLRB No. 38, 131 LRRM (BNA) 1617 (1989) .....	5, 22, 23, 24
<i>Giant Food Stores, Inc.</i> , 298 NLRB No. 50, 134 LRRM (BNA) 1117 (1990) .....	23
<i>Granco, Inc.</i> , 294 NLRB No. 7, 131 LRRM (BNA) 1325 (1989) .....	7
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	11, 12, 14, 15
<i>Jean Country</i> , 291 NLRB No. 4, 129 LRRM (BNA) 1201 (1988) .....	passim
<i>Laborers Health &amp; Welfare Trust Fund v. Advanced Lightweight Concrete Co.</i> , 484 U.S. 539 (1988) .....	2
<i>Lechmere, Inc.</i> , 295 NLRB No. 15, 131 LRRM (BNA) 1480 (1989) .....	6, 7, 20
<i>Lechmere, Inc. v. NLRB</i> , 914 F.2d 313 (1st Cir. 1990) .....	passim
<i>Litton Financial Printing Div. v. NLRB</i> , No. 90-285 (U.S. filed Dec. 27, 1990) .....	2
<i>Little &amp; Co.</i> , 296 NLRB No. 89, 132 LRRM (BNA) 1173 (1989) .....	7
<i>Marsh v. Alabama</i> , 326 U.S. 501 (1946) .....	11
<i>Mayer Group, Inc.</i> , 296 NLRB No. 9, 132 LRRM (BNA) 1005 (1989) .....	7

## TABLE OF AUTHORITIES—Continued

	Page
<i>Mountain Country Food Store, Inc.</i> , 292 NLRB No. 100, 130 LRRM (BNA) 1329 (1989) .....	8
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) .....	passim
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979) .....	15
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 110 S. Ct. 1542 (1990) .....	2, 25
<i>NLRB v. International Longshoremen's Ass'n AFL-CIO</i> , 473 U.S. 61 (1985) .....	25
<i>NLRB v. Nash-Finch Co.</i> , 404 U.S. 138 (1971)....	18
<i>NLRB v. Peachtree Center Management Co.</i> , No. 1:88-CV-1888 (N.D. Ga., filed Aug. 29, 1988) .....	18, 19, 25
<i>NLRB v. United Steelworkers of America ("Nultone")</i> , 357 U.S. 357 (1958) .....	9
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987) .....	15
<i>PTA Sales, Inc. v. Retail Clerks Local No. 462</i> , 96 N.M. 581, 633 P.2d 689 (1981) .....	18
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	8, 13
<i>Saginaw Joint Venture v. Retail Store Employees Union Local 40</i> , 413 Mich. 955, 322 N.W.2d 172 (1982) .....	18
<i>Sahara Tahoe Corp.</i> , 292 NLRB No. 86, 131 LRRM (BNA) 1021 (1989) .....	8
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	17
<i>Sears, Roebuck &amp; Co. v. San Diego County Dist. Council of Carpenters</i> , 436 U.S. 180 (1978) .....	passim
<i>Sentry Markets, Inc.</i> , 296 NLRB No. 5, 132 LRRM (BNA) 101 (1989) .....	7
<i>Shirley v. Retail Store Employees Union</i> , 225 Kan. 470, 592 P.2d 433 (1979) .....	18
<i>Smitty's Super Markets, Inc. v. Retail Store Employees Local 322</i> , 637 S.W.2d 148 (Mo. Ct. App. 1982) .....	18
<i>Sparks Nugget, Inc.</i> , 298 NLRB No. 69, 134 LRRM (BNA) 1121 (1990) .....	7

## TABLE OF AUTHORITIES—Continued

	Page
<i>Subbiondo &amp; Assocs., Inc.</i> , 295 NLRB No. 132, 132 LRRM (BNA) 1006 (1989) .....	7
<i>Target Stores</i> , 292 NLRB No. 93, 130 LRRM (BNA) 1331 (1989) .....	7
<i>Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants</i> , 489 U.S. 426 (1989) .....	2
<i>Trident Seafoods Corp.</i> , 293 NLRB No. 125, 131 LRRM (BNA) 1247 (1989) .....	7
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977) .....	15
<i>W.S. Butterfield Theatres, Inc.</i> , 292 NLRB No. 8, 130 LRRM (BNA) 1113 (1988) .....	8
<i>Wylie Const. Co.</i> , 295 NLRB No. 119, 132 LRRM (BNA) 1007 (1989) .....	7
 <i>Miscellaneous:</i>	
29 U.S.C. § 157 (1988) .....	<i>passim</i>
53rd Annual Report of the National Labor Relations Board (CCH) (1988) .....	20
Note, <i>Labor Law—Employees' Right to Organize</i> , 104 Harv. L. Rev. 1407, 1411 (1991) .....	12
Supreme Court of the United States, Rule 37.3.....	1

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

\_\_\_\_\_  
No. 90-970  
\_\_\_\_\_

LECHMERE, INC.,  
*Petitioner,*  
v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*  
\_\_\_\_\_

On Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit  
\_\_\_\_\_

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA AND THE  
INTERNATIONAL MASS RETAIL ASSOCIATION  
AS AMICI CURIAE SUPPORTING PETITIONER**  
\_\_\_\_\_

This brief *amici curiae* of the Chamber of Commerce of the United States of America (the "Chamber") and the International Mass Retail Association ("IMRA") is filed with the consent of the parties pursuant to Rule 37.3 of the Rules of this Court.

**STATEMENT OF INTEREST**

The Chamber is an association comprised of 180,000 companies and business and professional organizations. As the largest federation of businesses in the United

States, the Chamber serves as the primary voice of the American business community, regularly representing the interests of its member employers in significant labor relations matters affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation is an integral aspect of the Chamber's activities. Accordingly, the Chamber has sought to promote these interests by filing briefs in a wide spectrum of significant labor relations cases.<sup>1</sup>

IMRA is a nonprofit trade association of mass retailers. IMRA's more than 100 retail members operate over 40,000 stores throughout the United States and generate over \$150 billion in annual sales. IMRA members range in size from one-store businesses to multi-billion dollar chains operating thousands of stores throughout the nation.

The question raised in the instant case is under what circumstances nonemployee union solicitors may intrude upon an employer's private property rights in the name of promoting rights conferred upon employees pursuant to Section 7 of the National Labor Relations Act ("the Act" or "the NLRA"), 29 U.S.C. § 157 (1988).<sup>2</sup> The Chamber and IMRA believe that the National Labor

<sup>1</sup> E.g., *Litton Financial Printing Div. v. NLRB*, No. 90-285 (U.S. filed Dec. 27, 1990); *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990); *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

<sup>2</sup> Section 7 provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Relations Board ("the Board" or "the NLRB") has once again abandoned the applicable test announced by this Court more than three decades ago in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), and instead has substituted the test the Board fashioned in *Jean Country*, 291 NLRB No. 4, 129 LRRM (BNA) 1201 (1988).

The Chamber's and IMRA's purpose in writing as *amici curiae* is in part to relay their concerns that *Jean Country* eviscerates the doctrine announced in *Babcock & Wilcox*, leaving employers' private property rights exposed to maximum infringements by union trespassers. In addition, *amici* write to stress the practical difficulties faced by employers forced to remain in a "no-man's land"<sup>3</sup> in which nonemployee union organizers may trespass upon employer private property while the employers are barred from obtaining injunctive relief. Cf. *Sears*, 436 U.S. at 209 (Blackmun, J., concurring) (suggesting a union's mere invocation of NLRB jurisdiction through the filing of an unfair labor practice charge is sufficient to stay a state court's hands in employer actions for injunctive relief from trespass). When viewed in light of its nonconformance with *Babcock & Wilcox* and the realities of labor disputes in which employers must defend their private property interests, it becomes plain that *Jean Country*, and the First Circuit's application of that test to the instant case, should be overruled.

### SUMMARY OF ARGUMENT

Employers are faced with a Hobson's choice while unions trespass on their private property. They must either await the results of the Board's protracted and unduly complicated balancing exercise under *Jean Country* or seek relief from state courts where injunctive relief may be denied because the union has filed an unfair labor practice charge alleging improper denial of access,

<sup>3</sup> See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 212 (1978) (Powell, J., concurring).



thus ousting the state court of jurisdiction.<sup>4</sup> In either case, the union trespassers are given ample opportunity to achieve their trespassory objectives while the employer is stymied. Reaffirmation of *Babcock & Wilcox* and its progeny, which make union access the exception rather than the rule by prohibiting such access whenever the union has alternative means to reach nonunion employees, would ease this dilemma.

I. *Side One of the Employer's Hobson's Choice*: The Board's inquiry under *Babcock & Wilcox* is relatively straightforward: can the union, through its reasonable efforts, reach employees by nontrespassory means? *Jean Country* wanders far afield from this test. First, the Board begins with an incorrect premise by equating the Section 7 rights of employees with those of nonemployees. The Board further obfuscates *Babcock & Wilcox* by failing to follow the Court's instruction to examine the existence of alternative means as a threshold—and thus usually dispositive—inquiry. Moreover, in considering alternative channels of communication, the Board improperly narrows the universe of alternative means and inquiries impermissibly into their effectiveness. Finally, the Board devalues employers' property interests by attempting to assess the strength of those interests based on such considerations as whether the employer's work-site is located in a shopping mall. The cumulative effect of the Board's departures from *Babcock & Wilcox* is that vindication of employer property interests comes, if at all, too late to be of any practical, salutary effect.

II. *Side Two of the Employer's Hobson's Choice*: One alternative an employer has is the opportunity to seek injunctive relief against trespass from state courts. However, the preemption principles enunciated in *Sears*, 436 U.S. 180, as incorrectly interpreted by the Board and unions opposing employer requests for injunctive relief

<sup>4</sup> *Sears*, 436 U.S. at 209 (Blackmun, J., concurring).

from state courts, can defeat employer actions to obtain preliminary relief from union trespass.<sup>5</sup> In fact, employers have been prosecuted for unfair labor practices merely for maintaining actions for injunctive relief in state courts.<sup>6</sup> *Jean Country* exacerbates the employer's difficulties in protecting its private property, placing the employer in a "no-man's land" pending the Board's time-consuming, unduly complicated resolution of a union access dispute.

Because it has failed to follow this Court's repeated and clear instructions for resolving disputes over union access to employer property, the Board is due no deference in the instant case.

## BACKGROUND

Petitioner Lechmere, Inc. operates the dominant retail store in Lechmere Shopping Plaza in Newington, Connecticut. The plaza also includes thirteen other smaller shops. Newington, Connecticut is a suburb in a metropolitan area of approximately 900,000 people. *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 315 (1st Cir. 1990). In 1987, Local 919 of the United Food and Commercial Workers (the "Union"), in violation of Lechmere's strictly and uniformly enforced no-solicitation policy,

<sup>5</sup> See, e.g., *Cross Country Inn, Inc. v. South Cent. Dist. Council*, 50 Ohio App. 3d 8, 12, 552 N.E.2d 232, 236 (1989) (interpreting *Sears*, state court holds that in the absence of violence it is pre-empted from enjoining union handbilling on employer's private property where the union has filed an unfair labor practice charge with the Board encompassing the question whether the union's trespass is protected).

<sup>6</sup> See, e.g., *Giant Food Stores, Inc.*, 295 NLRB No. 38, 131 LRRM (BNA) 1617 (1989) (employer prosecuted by NLRB General Counsel for an unfair labor practice for maintaining a suit for injunctive relief from trespass after union filed an unfair labor practice charge).

entered the plaza's parking lot where it leafleted cars that it suspected belonged to Lechmere employees.<sup>7</sup> *Id.* at 316.

Lechmere management evicted these nonemployee solicitors, and did so again on two subsequent occasions when they returned. Through its use of a few of the alternative, nontrespassory communicative channels open to it, the Union obtained the names and addresses of forty-one nonsupervisory employees. 914 F.2d at 316. However, approximately one month after its organizational campaign began, the Union on July 21, 1987 filed an unfair labor practice charge with the NLRB, seeking access to Lechmere's private property to continue its solicitation activities. *Id.* at 317. The Board issued a complaint on November 18, 1987, and a hearing before an administrative law judge ("ALJ") followed. *Lechmere, Inc.*, 295 NLRB No. 15, attached ALJ's slip op. at 1 (Sept. 30, 1988). Applying the criteria of *Fairmont Hotel Co.*,<sup>8</sup> a kindred precursor to *Jean Country*, the ALJ concluded that Lechmere violated Section 8(a)(1) of the Act by refusing the Union access to its parking lots to conduct organizational activity. 914 F.2d at 317. The ALJ reached this conclusion notwithstanding his finding that "there were adequate [nontrespassory] alternate means of contacting the employees available to the Union." *Lechmere*, 295 NLRB No. 15, attached ALJ's slip op. at 9-10.

<sup>7</sup> The record below reflects that the Union's solicitation was not limited to leafleting. Petitioner proffered evidence that the Union's representatives repeatedly entered Lechmere's store, and once inside, confronted employees, distributed literature, placed literature in merchandise and in store rest rooms, and entered restricted areas. See Respondent's Brief in Support of Exceptions, No. 39-CA-3571, at 10 (NLRB, filed Dec. 2, 1988); Brief for the Petitioner *Lechmere, Inc.*, No. 89-1683, at 13 (1st Cir., filed Oct. 13, 1989).

<sup>8</sup> See 282 NLRB 139 (1986).

The Board<sup>9</sup> and the United States Court of Appeals for the First Circuit,<sup>10</sup> each applying *Jean Country*, upheld the ALJ's finding of a violation, although both found, *contrary to the ALJ*, that the Union did not have adequate alternative means for reaching Lechmere's employees.

# **I. JEAN COUNTRY MATERIALLY ALTERS BABCOCK & WILCOX AND THEREBY FRUSTRATES EMPLOYERS' EFFORTS TO VINDICATE THEIR PROPERTY INTERESTS IN A TIMELY MANNER.**

The crux of the *Jean Country* test is the weighing of three factors—the employer property rights, the union derivative Section 7 rights, and the availability of "effective" alternative means. 129 LRRM at 1205. The Board's stated aim in analyzing these factors is to determine "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." *Id.* However, the interplay of these factors has resulted in a skew in favor of union access that is inconsistent with this Court's clear precedent.<sup>11</sup> Fur-

<sup>9</sup> See 295 NLRB No. 15, 131 LRRM (BNA) 1480 (1989).

<sup>10</sup> See 914 F.2d 313.

<sup>11</sup> The overwhelming number of reported access cases decided by the Board under *Jean Country* reach results in favor of the union's right of access. See, e.g., *Sparks Nugget, Inc.*, 298 NLRB No. 69, 134 LRRM (BNA) 1121 (1990); *Little & Co.*, 296 NLRB No. 89, 132 LRRM (BNA) 1173 (1989); *Sentry Markets, Inc.*, 296 NLRB No. 5, 132 LRRM (BNA) 1001 (1989), enforced, 914 F.2d 113 (7th Cir. 1990); *Mayer Group, Inc.*, 296 NLRB No. 9, 132 LRRM (BNA) 1005 (1989); *Wylie Const. Co.*, 295 NLRB No. 119, 132 LRRM (BNA) 1007 (1989); *Subbiondo & Assocs., Inc.*, 295 NLRB No. 132, 132 LRRM (BNA) 1006 (1989); *Granco, Inc.*, 294 NLRB No. 7, 131 LRRM (BNA) 1325 (1989); *Trident Seafoods Corp.*, 293 NLRB No. 125, 131 LRRM (BNA) 1247 (1989); *Dolgin's, A Best Co.*, 293 NLRB No. 102, 131 LRRM (BNA) 1159 (1989); *Target Stores*, 292 NLRB No. 93, 130 LRRM (BNA) 1331



thermore, the incremental impact of each factor added by the Board is a commensurately longer delay in finally resolving an access dispute, a delay that has the practical effect of nullifying employer private property rights.

**A. Despite The Express Distinction Drawn In *Babcock & Wilcox*, The Board Continues To Confuse The Section 7 Rights Of Employees With Those Of Nonemployees.**

In *Jean Country* and in the case at bar, the Board once again ignored the essential distinction between employee and nonemployee union organizers' Section 7 rights, in effect treating them as one and the same. The First Circuit uncritically adopted the Board's blurring of these categorical rights, finding that "[a]lthough the Section 7 right is the workers' right, not the union's right, unions and their agents, derivatively, enjoy the protection of Section 7." 914 F.2d at 318. Thus, the Board and the First Circuit began with an erroneous premise.

Employers have long understood that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (citation omitted). Thus, employees enjoy considerably greater latitude to conduct persuasive activities for or against unions on their employers' property. The Board ignored this principle in *Babcock & Wilcox* when it attempted to treat interchangeably the Section 7 rights of employees and those of nonemployee union organizers. This Court, however, found the distinction between these two sets of rights to be "one of substance." 351 U.S. at 113 (emphasis added). While the Court stated that employees' ex-

(1989); *Mountain Country Food Store, Inc.*, 292 NLRB No. 100, 130 LRRM (BNA) 1329 (1989); *Sahara Tahoe Corp.*, 292 NLRB No. 86, 131 LRRM (BNA) 1021 (1989); *W.S. Butterfield Theatres, Inc.*, 292 NLRB No. 8, 130 LRRM (BNA) 1113 (1988).

ercise of their Section 7 rights is dependent "in some measure" on the flow of information from nonemployee union organizers, see *Babcock & Wilcox*, 351 U.S. at 113, it did not hold that the employees' and nonemployees' rights are the same. To the contrary, the Court was swift to qualify the ancillary role of nonemployees: "[I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." 351 U.S. at 113. *Babcock & Wilcox* affords nonemployees no greater access rights than this.<sup>12</sup> The Board's continued misapprehension of whose rights are at issue in access cases explains in large measure its propensity to shun the relatively clear rule of *Babcock & Wilcox*.

**B. *Jean Country* Misplaces The Alternative Means Factor Held To Be A Threshold Inquiry In *Babcock & Wilcox* And Its Progeny.**

In *Jean Country*, the Board belatedly recognized that it must consider the existence of alternative means in every union access case. See 129 LRRM at 1203.<sup>13</sup> How-

<sup>12</sup> The breadth of the stranger-union's rights bears little resemblance to that of employees and even less to those of the employer, who may conduct anti-union activities on his property without yielding time to employees to conduct pro-union solicitation. *NLRB v. United Steelworkers of America ("Nutmeg")*, 357 U.S. 357, 364 (1958).

<sup>13</sup> In *Jean Country*'s precursor, *Fairmont Hotel*, the Board concluded that it would only consider alternative means if the union's Section 7 interests and the employer's private property interests are relatively equal in strength. See 282 NLRB at 142. As the Board later reflected in *Jean Country*, it was concerned that "making access decisions turn on the presence or absence of alternative means of communication could result in allowing access for the exercise of core Section 7 rights . . . less readily than for less central rights, such as area standards activity." 129 LRRM at 1204. The Board was correct that area standards activity is less central to Section 7 than organizational activity. See *Eastex, Inc. v. NLRB*,



ever, the Board, contrary to *Babcock & Wilcox*, has again avoided making that inquiry a *threshold*—and thus potentially dispositive—question. Instead, *Jean Country* considers alternative means along side other factors such as the nature of the Section 7 and private property interests asserted. This approach strays far afield from *Babcock & Wilcox* and its progeny. The Court in *Babcock & Wilcox* could not have been clearer that the threshold inquiry is whether the union has available alternative means of communicating with employees: “The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees’ exercise of their own rights. It does not require that the employer permit the use of its facilities for organization *when other means are readily available.*” 351 U.S. at 113-14 (emphasis added). Absent proof that other means are nonexistent, the Board’s inquiry is terminated.

This Court has repeatedly reaffirmed *Babcock & Wilcox*, each time declining to abandon that case’s maxim that the existence of alternative means to communicate with employees obviates union access to employer private property. In *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court declined to apply first amendment principles to analyze union solicitors’ right of access to employer private property. Significantly, the Court reemphasized that under *Babcock & Wilcox* the employer’s property rights would only be required to yield to organization rights “[a]fter the requisite need for access to the employer’s property has been shown . . . .” *Id.* at 545 (emphasis added).<sup>14</sup>

437 U.S. 556, 583 n.3 (1978) (Rehnquist, J., dissenting). What the Board should have recognized foremost, however, is that “[e]ven on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances.” *Sears*, 436 U.S. at 206 (footnote omitted).

<sup>14</sup> Although dissenting in *Central Hardware*, Justice Marshall shared the view that *Babcock & Wilcox* controlled and that that

This Court again declined to alter the *Babcock & Wilcox* doctrine in *Hudgens v. NLRB*, 424 U.S. 507 (1976). There, the Board perpetuated its error of analyzing union trespassers’ right of access to private property under first amendment principles, urging that the public character of Hudgens’ shopping mall could be analogized to a business block of the company town held to be subject to first amendment constraints in *Marsh v. Alabama*, 326 U.S. 501 (1946). In reaffirming that *Babcock & Wilcox*—and not first amendment principles—would govern union access disputes, the Court described *Babcock & Wilcox* as “a case which held that union organizers who seek to solicit for union membership may intrude on an employer’s private property *if no alternative means exist for communicating with the employees.*” 424 U.S. at 511 (emphasis added).

Finally, in *Sears*, 436 U.S. 180, the Court explained that its decision to permit state courts to enjoin union trespassory activity arguably protected by Section 7 would not derogate from the Board’s exclusive jurisdiction because:

While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. *To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists . . . .* That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* ac-

case’s balancing of the employer’s property rights and the union’s right of access occurs only “where a union has *no other means* at its disposal to communicate with employees other than to use the employer’s property . . . .” 407 U.S. at 548 (Marshall, J., dissenting) (emphasis added).

commodation principle has rarely been in favor of trespassory organizational activity.

*Id.* at 205 (footnotes omitted and emphasis added).

In sum, the dictates of this Court regarding union organizers' right of access to employer private property clearly demonstrate that the finding of alternative means should mark the terminal point of the Board's inquiry because the burden on the union "of showing that no other reasonable means of communicating its organizational message to the employees exists" is a "heavy" *devoir*. See *Sears*, 436 U.S. at 205.<sup>15</sup>

**C. *Jean Country's* View Of Alternative Means Distorts *Babcock & Wilcox*.**

In addition to misplacing the question of alternative means on a par with other factors which do not constitute threshold inquiries, *Jean Country* transforms the alternative means inquiry into a question of whether *effective* alternative means exist. Indeed, the Board has determined that it will consider "most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the [Union's] message." *Jean Country*, 129 LRRM at 1205. Here again, the Board is injecting a fact-laden variable which impedes the needed swift resolution of union access disputes. More importantly, the Board is attempting to revisit argu-

<sup>15</sup> To the extent that *dicta* in *Hudgens* concerning a "spectrum" of Section 7 and private property rights invites a more multifaceted analysis than the determination of the existence of alternative means, it is not at all inconsistent with *Babcock & Wilcox*. An examination of the nature and strength of the respective rights at issue may at times be necessary—if the union lacks alternative means for communicating its message to employees. Where such means are available, however, the nonemployee union organizers have no right to use the employers' property in servitude of their proselytizing activities—no matter what the nature of the rights they assert. See Note, *Labor Law—Employees' Right to Organize*, 104 Harv. L. Rev. 1407, 1411 (1991).

ments which this Court expressly rejected in *Babcock & Wilcox*. In *Babcock & Wilcox*, "[t]he Board viewed the place of work as so much more effective a place for communication of information that it held the employer guilty of an unfair labor practice for refusing limited access to company property to union organizers." 351 U.S. at 107-08 (emphasis added). The Court rejected arguments regarding the relative effectiveness of the available channels of communication and held that so long as the nontrespassory means of communication could reach employees, union organizers had no right of access to employers' property. *Id.* at 112.

Equally as unwarranted as its inquiry into effectiveness is the Board's attempt to pare the universe of alternative channels of communication available to the union. In *Jean Country*, as well as the case at bar, the Board mistakenly concluded that certain alternative means of communication were beyond the Union's fiscal reach and altogether ignored other means of communication that the Union failed to employ. For instance, although *Babcock & Wilcox* itself recognized "advertised meetings" as a usual channel of communication, see 351 U.S. at 111, there is no indication that the Union in the instant case planned, advertised or held any such meetings. The Lechmere employee who returned his union membership card might have been enlisted to advertise meetings, not only on Lechmere's property, but in nonworking areas of Lechmere's store. See *Republic Aviation*, 324 U.S. at 803 n.10. Indeed, this pro-union employee and others he and the Union might enlist could have served as conduits for other Union organizational messages.

By foreclosing these and other communicative alternatives,<sup>16</sup> the Board and the First Circuit shifted the analytical emphasis away from alternative means and onto

<sup>16</sup> It bears mentioning, for instance, that the Union voluntarily ceased picketing Lechmere on public property and also chose to abandon its use of the public area near an apron. 914 F.2d at 317.



less clear-cut factors such as the nature and strength of the respective rights asserted. The obvious result is an unwarranted protraction of the resolution of the dispute over access.

**D. *Jean Country* Devalues Employers' Property Interests.**

Under the Board's *Jean Country* analysis, certain employer property interests are accorded less protection than others. Specifically, the Board examines the "quasi-public characteristics" of the employer's property to determine the nature and strength of the employer's property interest, according employers with more "quasi-public" work-sites less protection. See *Jean Country*, 129 LRRM at 1207. Thus, each union access case invites a fact-intensive inquiry into such matters as the number of stores located on a given piece of property, the number of customers that enter the property, and the extent to which an employer's property resembles a public street or business block. See *id.* This Court, however, has prescribed a far more narrow analysis.

The Board's attempts to highlight the "quasi-public" features of employers' property as a means of justifying union access to such property is a tiresome echo of arguments previously rejected by this Court. In *Hudgens*, 424 U.S. 507, the Court unequivocally repudiated the doctrine of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), that where the employer's property "serves as the community business block and is freely accessible and open to the people in the area and those passing through," union members have a first amendment right to utilize those premises to express their views. *Id.* at 319 (quotation omitted).

Yet the Board attempts to revive the very same "community business block" rationale overruled in *Hudgens*, this time describing its approach as an examination of the "quasi-public characteristics" of the employers' property. The Board's disregard of this Court's clear instruc-

tions is manifest. And equally evident is the lethargic impact that consideration of "quasi-public" traits has on the swift resolution of access disputes. In light of *Hudgens*, there is nothing to suggest that employers whose businesses are located in shopping malls or similar complexes should be subject to a more prolonged process of scrutiny by the Board—and ultimately accorded less protection—due to the happenstance of being situated in a mall.<sup>17</sup>

**II. IN LIGHT OF PREEMPTION PRINCIPLES, *JEAN COUNTRY* DRAMATICALLY REDUCES EMPLOYERS' PROSPECTS OF OBTAINING MEANINGFUL VINDICATION OF THEIR PRIVATE PROPERTY INTERESTS.**

**A. Justice Powell's Fears That Employers Would Be Foreclosed From Interim Relief From Union Trespassing Have Been Realized.**

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197, 207 (1978), the Court held that the NLRA did not preempt a California state court's issuance of an injunction against a union's trespassory "area standards" picketing because the

<sup>17</sup> By attempting allusively to resurrect the constitutional arguments previously rejected by this Court, the Board urges an interpretation of Section 7 of the Act that may render that section constitutionally infirm. Compelling an employer to allow union trespassers access to private property in order to promote unionism burdens the employer's first and fifth amendment rights. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (requiring government to offer a compelling interest to justify forcing citizens to use their private property to promote a message with which they disagree); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (requiring that government regulations granting public access to private property "substantially advance" legitimate state interests). By allowing the stranger-union access to employer property only in truly exceptional circumstances, the Court wisely adheres to the longstanding rule of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).



controversy presented to the state court was not identical to the controversy that could be presented to the NLRB and the union had not invoked the jurisdiction of the Board by filing an unfair labor practice charge. Some of the Justices differed in their understanding of the Court's precise holding. Justice Blackmun, in a separate concurrence, maintained that "the logical corollary of the Court's reasoning is that if the union *does* file a charge upon being asked by the employer to leave the employer's property and continues to process the charge expeditiously, state-court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board, applying the standards of *NLRB v. Babcock & Wilcox Co.* . . . rules against the union and holds the picketing to be unprotected." *Id.* at 209 (Blackmun, J., concurring) (emphasis in original).

Justice Blackmun's interpretation of the majority's opinion prompted Justice Powell to write separately. Justice Powell forewarned that to the extent the Court's decision to uphold the state court's jurisdiction to issue an injunction turned on the fact that the union had not filed an unfair labor practice charge, the Court invited a situation "where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation." *Id.* at 213 (Powell, J., concurring). Such a result would follow because, assuming union organizers avail themselves of the protective cloak provided by filing an unfair labor practice charge, the NLRB General Counsel's decision whether to issue a complaint "may take weeks" and the Board itself lacks the authority to grant or obtain preliminary relief from the courts. *Id.* In the meantime, if the state court must stay its hand due to the pendency of an unfair labor practice charge, the employer is without any remedy other than self-help and its attendant potential for violence.

According to Justice Powell, it is no answer to the above "no-man's land" scenario that the preemption doc-

trine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), does not preclude state courts from enjoining violent picketing. "Trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive—*without initial violence*—of the target business and annoying to members of the public who wish to patronize that business. The 'danger of violence' is inherent in many—though certainly not all—situations of sustained trespassory picketing." *Sears*, 436 U.S. at 212-13 (emphasis added).

In light of the Board's inability to grant preliminary relief to the employer and the insidious character of sustained, organized picketing, Justice Powell rejected Justice Blackmun's interpretation of the majority decision. *Id.* at 214.<sup>18</sup> Justice Powell stated that he would not have joined the Court's opinion if it could be fairly construed to hold as Justice Blackmun perceived. As it turns out, however, the NLRB has caused Justice Powell's worst fears to be realized, and the overlay of the Board's latest *Jean Country* test only exacerbates the problem of the "no-man's land" that Justice Powell foresaw.

The interpretation of *Sears* against which Justice Powell cautioned has, at the urging of unions seeking access to private property, become the view of many state courts.<sup>19</sup>

<sup>18</sup> Normally, an employer can obtain no relief from the NLRB against union trespass. Union trespass does not constitute an unfair labor practice as long as the trespass is not accompanied by other union unfair labor practices such as restraint and coercion of employees, secondary boycotting or recognition picketing after thirty days without an election petition being filed.

<sup>19</sup> See, e.g., *Brown Jug, Inc. v. International Broth. of Teamsters, Local 959*, 688 P.2d 932, 937 (Alaska 1984) ("[W]here . . . a union does not submit the question to the NLRB, Alaska courts have jurisdiction"); *Cross Country Inn, Inc. v. South Cent. Dist. Council*, 50 Ohio App. 3d 8, 12, 552 N.E.2d 232, 236 (1989) ("In *Sears*, the

More importantly, the Board itself has advanced the position that state courts are deprived of jurisdiction upon the filing of a charge by a union. For instance, in a case litigated in the Northern District of Georgia,<sup>20</sup> the Board petitioned the court to vacate a state court injunction prohibiting union solicitation on the premises of the Peachtree Center, privately-owned commercial property.<sup>21</sup> The Board argued to the court:

Supreme Court found the assertion of state court jurisdiction to be appropriate because it did 'not create a significant risk of prohibition of protected conduct' . . . since the union had failed to invoke the jurisdiction of the National Labor Relations Board and the employer, Sears, had no right to do so"); *Shirley v. Retail Store Employees Union*, 225 Kan. 470, 592 P.2d 433, 437 (1979) ("If . . . a union, after receiving from the employer or property owner a notice to cease picketing, files a complaint with the NLRB and the board takes jurisdiction, a Kansas district court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public that immediately threatens public health and safety or that denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business"); *Saginaw Joint Venture v. Retail Store Employees Union Local 40*, 413 Mich. 955, 322 N.W.2d 172, 173 (1982) ("The authority of state courts to enjoin activities arguably protected or prohibited by sections 7 and 8 of the [NLRA] was pre-empted by the proceedings before the [NLRB]"); *Smitty's Super Markets, Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148, 154 (Mo. Ct. App. 1982) (state court to stay its hand until Board action taken but may thereafter act if it is concluded that the union trespassing activity was not protected); *PTA Sales, Inc. v. Retail Clerks Local No. 462*, 96 N.M. 581, 633 P.2d 689, 692 (1981). The Chamber and IMRA believe that the Board and the aforementioned state courts have misinterpreted *Sears* and that Justice Powell correctly states that the filing of a charge should not be dispositive of the pre-emption question.

<sup>20</sup> See *NLRB v. Peachtree Center Management Co.*, No. 1:88-CV-1888 (N.D. Ga., filed Aug. 29, 1988).

<sup>21</sup> See *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (Board possesses implied authority to enjoin state action "where its federal power pre-empts the field").

In the instant case, the Union has filed an unfair labor practice charge and a complaint has issued against PCMC, thus invoking the Board's jurisdiction. In contrast with *Sears*, it is clear that PCMC will be afforded Board resolution of whether the Union has a federal right to orderly and peaceful access to Peachtree Center premises. Under these circumstances the Supreme Court has recognized that the Board is the appropriate body to accommodate the conflicting interests at hand, not the state court.

. . . .

As is evident, the conduct at issue before the Board is the very same conduct being regulated by the Superior Court of Fulton County. The Board will be determining whether the Labor Act protects the Union's solicitation on Peachtree Center premises notwithstanding the trespass. The state court, by issuing a restraining order against the Union's peaceful entry onto Peachtree Center, has inappropriately acted upon conduct which is arguably protected under the Labor Act and within the Board's exclusive jurisdiction.

Memorandum in Support of Plaintiff's Amended Motion for a Preliminary Injunction, No. 1:88-CV-1888, at 13, 11 (filed Sept. 15, 1988) (Lodged with Supreme Court of United States on May 9, 1991).<sup>22</sup>

<sup>22</sup> The district court denied the NLRB's motion for a preliminary injunction. (Order, April 7, 1989). Thereafter, upon motion by the Board, the court allowed the Board to withdraw its complaint without prejudice. (Order, July 3, 1989). Despite the Board's defeat in this case, however, there is no indication that its policy or its overly restrictive view of *Sears* has changed. See *infra* note 25 and accompanying text. The district court orders of April 7, 1989 and July 3, 1989 were also lodged with this Court on May 9, 1991.



Thus, employers often must seek to protect their private property rights under circumstances where interim relief is not available because of the interpretation given *Sears* by state courts and the NLRB. In this context, adherence to the relatively straightforward test of *Babcock & Wilcox*, including its threshold requirement that unions bear their burden of proving the absence of alternative means, becomes critical if employers are to receive timely and meaningful vindication of their legitimate property interests.

**B. *Jean Country* Sacrifices Employers' Property Interests.**

Justice Blackmun observed in *Sears* with respect to the union's Section 7 rights that "[l]abor disputes are frequently short lived, and a temporary restraining order issued upon *ex parte* application may, if in error, render the eventual finding of § 7 protection a hollow vindication." 436 U.S. at 212 (Blackmun, J., concurring). Likewise, the normally short life of a labor dispute may render moot vindication of employers' property rights when the process for protection of those interests is one which may take from many months to years.<sup>23</sup> If the

<sup>23</sup> The Board's most recent data indicate that the median time taken to decide whether to begin an unfair labor practice proceeding by issuing a complaint or dismissing a union's charge is forty-six days. See *53rd Annual Report of the National Labor Relations Board* (CCH) (1988), p. 248. Another one hundred and twenty-seven days elapse between the issuance of a complaint and the close of a hearing before an ALJ. The ALJ then takes a median of 139 days to issue his or her decision. Thereafter, the Board takes an additional 395 days to issue its decision. Thus, it takes a staggering total of 761 days in a typical case for an employer to vindicate its property interests through the full Board procedures. *Id.* Lechmere's case is as good an example as any. The Union filed its charges on July 21, 1987. An ALJ issued his opinion on September 30, 1988, and the Board issued its decision on June 15, 1989. 914 F.2d at 317; 131 LRRM at 1480. Given this delay, *Jean Country* is particularly unsuited to protection of employers' property interests because its unduly complicated analysis frustrates efficient resolution of union access disputes.

Board and the NLRB General Counsel, as mandated by *Babcock & Wilcox* and its progeny, adhered to the principle that access would be the exception rather than the rule and examined as a threshold matter only whether the union had met its burden of proving that alternative channels of communication were not open to it, employers would stand a much better chance of vindicating their rights while such vindication is still meaningful to them. *Jean Country*, however, completely thwarts this objective.<sup>24</sup>

First, where the criteria are as nebulous and complicated as *Jean Country* prescribes, it is difficult for the General Counsel, in the exercise of prosecutorial discretion, to dismiss a charge outright. The court of appeals in this case described the *Jean Country* paradigm as follows: "[T]he Board . . . must gather the three interdependent bundles of facts . . . [—] strength of employees' Section 7 right, strength of employer's property right, availability and efficacy of alternative means of communication—tie them together, and weigh them in the aggregate." *Lechmere*, 914 F.2d at 321. This factual and legal conundrum gives the General Counsel substantial incentive to issue a complaint rather than to dismiss a union's access charge. That is because the *Jean Country* test is so fact-laden and obscure that the General Counsel is more likely to conclude that the issue is one more properly placed before a trier-of-fact—the ALJ—and ultimately the Board and the courts.

Second, even assuming that a charge in some cases will not result in issuance of a complaint, the *Jean Country* test inevitably prolongs the amount of time necessary to investigate the charge. Under *Babcock & Wilcox* and its progeny, properly construed, the General

<sup>24</sup> It is, of course, no answer to the employer's dilemma that it may sue a union whose trespassory activity is ultimately found unprotected by the Board. It is, to say the least, difficult to quantify the damages caused by trespassory organizational activity—particularly where the union succeeds in its trespassory objectives.



Counsel should first inquire whether the union had alternative means of communication available to it. Unless the union, which bears the burden of proving the need for access, can demonstrate the lack of such alternative channels, the General Counsel's inquiry is ended. Certainly the factual investigation under the appropriate *Babcock & Wilcox* standard is less arduous and time-consuming than under *Jean Country*, where alternative means must be considered along with three or four other variables. While the General Counsel and the Board are bundling and weighing, however, the employer's property interests are irreparably harmed because vindication of such rights after the union, through trespassory means, has achieved—or substantially achieved—its organizational objective is equivalent to no vindication at all.

**C. The General Counsel And The Board Have Discouraged Employers From Seeking State Court Injunctive Relief, Thus Fostering Employer Reliance On The Ineffective *Jean Country* Test.**

The problems employers face in vindicating their private property rights do not stop at the interplay of *Sears* and *Jean Country* or the potential dismissal of their state court trespass actions. Employers may also face prosecution by the NLRB General Counsel. The General Counsel has taken the prosecutorial position—one that the Board has apparently not rejected—that an employer's maintenance of a state court action for injunctive relief from union trespass after the union has filed an unfair labor practice charge may constitute an independent violation of Section 8(a)(1) of the NLRA. See, e.g., *Giant Food Stores, Inc.*, 295 NLRB No. 38, 131 LRRM (BNA) 1617, 1620 (1989).

In *Giant Food*, nonemployee union members trespassed upon premises leased by Giant in order to engage in area standards picketing and handbilling against that employer. Giant filed a civil suit in Pennsylvania state court requesting that the court enjoin the union's tres-

pass. The union responded by filing an unfair labor practice charge alleging that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the employer's suit was baseless and intended to curtail the union's exercise of its Section 7 rights. The employer continued to maintain its suit after the charge was filed. The state court held, *inter alia*, that under *Sears* state court jurisdiction was preempted because the union had filed an unfair labor practice charge. The court therefore denied Giant's request for injunctive relief. Giant appealed the latter ruling.

While Giant's state court appeal was pending, an NLRB administrative law judge held hearings on the union's charge. During the proceeding before the ALJ—and thereafter, before the Board—"[t]he General Counsel . . . [took] the position that after the Union filed an unfair labor practice charge, the state court's jurisdiction was preempted and, therefore, [Giant's] maintenance of the suit after that date violated the Act." 131 LRRM at 1621.<sup>25</sup> The ALJ noted that Pennsylvania courts had not resolved "the question of when preemption of state court subject matter jurisdiction occurs upon the filing of a charge." 295 NLRB No. 38, attached ALJ slip op. at 18 (July 17, 1986). Taking the latter fact into account as well as the disputed interpretations of *Sears* among this Court's Justices, the ALJ held that Giant's suit was not baseless within the meaning of *Bill Johnson's*.

While agreeing with the ALJ that the union's complaint regarding preemption should, for the time being, be dismissed, the Board "retain[ed] jurisdiction over this com-

<sup>25</sup> In a subsequent motion for reconsideration, the General Counsel stated its position in even clearer terms, contending, in the words of the Board, that "the maintenance of a retaliatory lawsuit in state court is an unfair labor practice *whenever* that state court lawsuit is pre-empted by the National Labor Relations Act." 298 NLRB No. 50, 134 LRRM (BNA) 1117, 1118 (1990) (emphasis added).

plaint allegation for further consideration on prompt notification by any party of a final, binding determination or resolution of the merits by the Commonwealth of Pennsylvania." 131 LRRM at 1621. In so doing, the Board apparently left open the issue of whether the employer, if it was unsuccessful in state court, did violate Section 8(a)(1). See also *American Pacific Concrete Pipe Co.*, 292 NLRB No. 133, 130 LRRM (BNA) 1501, 1503 (1989) (according to the Board, "[t]he implication [of footnote five in *Bill Johnson's*] is that the Board, in determining whether or not the filing of preempted state court suits is violative of the Act, may hold that an employer who sues an employee for a retaliatory motive is guilty of a violation of the Act").

Whether the General Counsel is right or wrong that an employer may not maintain a suit for injunctive relief once an unfair labor practice charge has been filed, the reality is that the General Counsel has sought to make it more difficult and costly for employers to turn to state courts for injunctive relief against union trespass, and to pursue appeal rights they may have in the state court system. Employers must roll the dice—either forego actions to vindicate their property interests in state court, or be prosecuted by the NLRB General Counsel for violating federal labor law.<sup>26</sup> *Giant Food* is merely one example of the barriers employers face. At the same time, the Board has made state court relief increasingly necessary because *Jean Country* creates an analytical vortex that renders the Board incapable of vindicating employers' private property rights in a timely—and thus meaningful—fashion. Thus, the employer's "no-man's land" widens, leaving unions with an even greater oppor-

<sup>26</sup> The next step in this still unfolding illogical conundrum, if the Board ultimately adopts the General Counsel's position, could be Board petitions in federal district court under Section 10(j) of the Act to enjoin employers from maintaining state court trespass actions after issuance of an unfair labor practice complaint by the NLRB General Counsel.

tunity to achieve their trespassory objectives pending resolution of the access dispute.

#### D. The Board Is Due No Deference.

Because the Board has failed repeatedly to follow the Court's *Babcock & Wilcox* standard and because the Board has adopted a test that maximizes the harm to private property rights, it follows that the Board is entitled to no deference in the present case. The Board is not free, on the assumption that this Court will defer, to discard the Court's well-established precedent; the Court appropriately reviews whether the Board has acted consistently with its prior cases. See *NLRB v. International Longshoremen's Ass'n AFL-CIO*, 473 U.S. 61, 78-79 (1985).

Moreover, the instant case is one in which a cardinal premise for deferring to the Board—its expertise in assessing industrial reality<sup>27</sup>—simply does not apply. On the one hand, the Board argues for "industrial reality" which guards its exclusive jurisdiction to the point where a state court is powerless to act—except in violent or obstructive situations—pending the resolution of an unfair labor practice charge. See, e.g., *Peachtree Center*, No. 1:88-CV-1888. On the other hand, the Board has adopted a test, *Jean Country*, which predictably moves much too slowly to protect the same property interests that the Board desires the state courts to refrain from protecting. This is not industrial expertise and this is not industrial reality. The Board, like any other agency, must be made to follow the precedents of this Court. This is especially imperative where its failure to do so invites trespass and renders unprotected rights as essential as private property rights.

<sup>27</sup> See *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

**CONCLUSION**

For the above reasons, the judgment of the First Circuit should be reversed.

Respectfully submitted,

*Of Counsel:*

STEPHEN A. BOKAT

MONA C. ZEIBERG

NATIONAL CHAMBER  
LITIGATION CENTER

1615 H Street, N.W.

Washington, D.C. 20062

(202) 463-5337

JOHN S. IRVING

Counsel of Record

KIRKLAND & ELLIS

655 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 879-5000

*Attorney for the*

*Chamber of Commerce of the*

*United States of America*

ROBERT J. VERDISCO

INTERNATIONAL MASS RETAIL ASSOCIATION

1901 Pennsylvania Avenue, N.W.

10th Floor

Washington, D.C. 20006

(202) 861-0774



No. 90-970

Supreme Court, U.S.

FILED

FEB 15 1991

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

LECHMERE, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The First Circuit

BRIEF OF NATIONAL RETAIL FEDERATION, AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER

JOHN W. NOBLE, JR.  
*Counsel of Record*  
POPE, BALLARD, SHEPARD &  
FOWLE, LTD.  
69 West Washington Street  
Chicago, IL 60602-3069  
(312) 214-4200

*Counsel for Amicus Curiae,*  
*National Retail Federation*

February 14, 1991

## TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae .....	1
Reasons for Granting the Petition.....	3
A. <i>Jean Country</i> and its Progeny Have Substan- tially Changed the Law as Established by This Court's Precedent .....	3
B. The NLRB has Attempted, by Fiat, to Create a Separate Rule for Retail Stores.....	6
C. The NLRB's Retail Store Cases Represent an Attempt to Resurrect <i>Logan Valley</i> in Contra- vention of this Court's Decision in <i>Central</i> <i>Hardware Co. v. NLRB</i> .....	13
Conclusion .....	15

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Amalgamated Food Employees Union v. Logan Valley Plaza</i> , 391 U.S. 308 (1968).....	13, 14
<i>Central Hardware Company v. NLRB</i> , 468 F.2d 252 (8th Cir. 1972).....	11, 12
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	13, 14, 15
<i>Century Markets, Inc.</i> , 296 N.L.R.B. No. 5, 132 L.R.R.M. 1001 (1989).....	8
<i>Dolgin's a Best Company</i> , 293 N.L.R.B. No. 102, 131 L.R.R.M. 1159 (1989).....	7
<i>Granco, Inc.</i> , 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989) .....	7
<i>Jean Country</i> , 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (1988).....	2, 3, 5, 6
<i>Monogram Models, Inc.</i> , 192 N.L.R.B. 705, 77 L.R.R.M. 1913 (1971).....	5, 11, 12
<i>Mountain Country Food Store Inc.</i> , 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989).....	7
<i>NLRB v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) .....	3, 4, 5, 6, 8, 10, 11, 12, 14
<i>NLRB v. S &amp; H Grossingers's, Inc.</i> , 372 F.2d 26 (2d Cir. 1967) .....	10
<i>NLRB v. Lake Superior Lumber Corp.</i> , 167 F.2d 147 (6th Cir. 1948).....	10

## TABLE OF AUTHORITIES - Continued

## Page

<i>Red Food Stores, Inc.</i> , 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989).....	9
<i>Rockway, a Division of Federated Department Stores</i> , 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989).....	9
<i>Sears Roebuck &amp; Co. v. Carpenters</i> , 436 U.S. 180 (1977) .....	10, 12
<i>Target Stores</i> , 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989).....	7
<i>Target Stores</i> , 300 N.L.R.B. No. 136, ____ L.R.R.M. ____ (1990) .....	8, 14
<i>Tecumseh Food Land</i> , 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989).....	9



No. 90-970

---

In The  
**Supreme Court of the United States**  
October Term, 1990

---

LECHMERE, INC.,

v.

*Petitioner,*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

---

Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The First Circuit

---

BRIEF OF NATIONAL RETAIL FEDERATION, AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER

---

This brief is respectfully submitted on behalf of the National Retail Federation (NRF), as *amicus curiae*. Pursuant to Rule 37.2 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

---

**I. INTEREST OF THE AMICUS CURIAE.**

National Retail Federation (NRF) is the largest national trade association representing the retail industry.

Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the new organization represents fifty state retail associations and twenty-seven national retail associations. In total, NRF represents over one million retail establishments in the United States, which employ nearly sixteen million people.

As a representative of such a large number of retail establishments, NRF is naturally interested in any litigation involving a retail business. The instant case is of particular interest to NRF because a very considerable number of its members own outright or have a valid leasehold interest in parking lots and other premises immediately adjoining their stores. Lechmere, Inc., Petitioner here, like many of NRF's members, since 1982 has prohibited solicitation of any kind on such premises, whether by charities, unions, or any other organizations.

What the National Labor Relations Board has done in this case and, as we will show, in virtually all of the cases following *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. 1201 (1988) is to invalidate such long-standing no-solicitation rules when they are applied by the retail store to prevent non-employee union organizers from distributing literature and/or picketing on such store-owned premises.

In NRF's view, this broad assault on a rule widely applied in the retail industry for many years which prohibits this kind of trespass on store-owned or store-leased premises such as parking lots, is a dramatic departure

from this Court's views, and in particular, its long-standing precedent created by the opinion in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

NRF and its members are deeply disturbed by the change which the NLRB's decision in *Jean Country* has brought about, because it substantially dilutes the legitimate private property interest which NRF members have had under the law. This private property interest includes the right to control, in a non-discriminatory manner, the use of its wholly-owned or leased property, and to prohibit its use for unauthorized purposes.

Because of these concerns, NRF urges this Court to grant the Petition for a Writ of Certiorari herein.

---

## II. REASONS FOR GRANTING THE PETITION.

### A. *Jean Country* and its Progeny have Substantially Changed the Law as Established by This Court's Precedent.

In the landmark case of *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), a unanimous court held that an employer may validly post its property against non-employee distribution of union literature, where reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. Further, the employer's notice must not discriminate against union access by allowing other types of distribution on the employer's property. *Id.* at 112. In the instant case, it is undisputed that the employer did not allow any other types of distribution.

Other alternative means of communication of the same type available to the union in *Babcock & Wilcox* were available to the union here. It was as true here as in *Babcock & Wilcox* that:

The usual methods of imparting information are available. . . . The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. *Id.* at 113.

In this case, as in *Babcock & Wilcox*, the union contacted approximately 20% of the employees through four different mailings. It made home visits. It placed five advertisements in a daily newspaper in an area where most employees lived. Union organizers stood on the grassy apron bracketing the main entrance to the Petitioner's parking lot and there attempted to distribute handbills to persons who, because of the early pre-store hour, were likely to be employees of Petitioner. Except for a brief interruption, the union was permitted to distribute on the apron because police officers confirmed that the apron was public property on which the union was entitled to carry on this activity.<sup>1</sup>

For almost a month, the union also picketed, stationing its pickets on the grassy apron, and for over six months, intermittent picketing of this type took place. The union also obtained automobile license numbers and, by checking out the ownership of these numbers, it

<sup>1</sup> Apparently because they did not like being videotaped engaged in such handbilling, the union representatives did not pursue this available means of communication and left the area.

secured the names and addresses of some forty-one of Lechmere's employees. It mailed its literature and authorization cards to these persons. Only one authorization card was signed and returned. Others who received the cards and literature were apparently not interested in returning them.

As pointed out by the dissenting judge in the Court of Appeals, the facts in this case are very, very similar to those in *Babcock & Wilcox*, with the possible exception that the community in which the store is located is a larger city than the one involved in *Babcock & Wilcox*. The size of the city had not been regarded by the NLRB, following the *Babcock & Wilcox* decision, as significant. *Monogram Models Inc.*, 192 N.L.R.B 705, 77 L.R.R.M. 1913 (1971). The mere size of the city of Chicago, (a metropolitan area much larger than the metropolitan area here of Hartford, Connecticut) was, in *Monogram*, not regarded as rendering employees' homes inaccessible to union organizers.

Obviously, then, what has happened is that the NLRB has attempted to change the law. The Board has now failed to apply the precedent of *Babcock & Wilcox* to a factual situation virtually on all fours with that in *Babcock & Wilcox*.

The Board, as it has done since the *Jean Country* case, engages in a semantic exercise in the course of which it purports to analyze the relative strengths and weaknesses of the union interest and the interests of the employer. But, we respectfully submit, what the Board has really done is to change its policy, by adopting a *de facto* rule



that parking lots and other retailer-owned or leased property adjacent to the stores are to be made available to non-employee union organizers, under virtually all circumstances.

**B. The NLRB has Attempted, by Fiat, to Create a Separate Rule for Retail Stores.**

In *Jean Country*, the Board decided to temper its application of this court's *Babcock & Wilcox* precedent by undertaking to distinguish among various strengths of rights and interests. It purports to analyze and determine in each case how "strong" is an employer's property interest and how "strong" the union's interest is in disseminating various types of publicity.

Whether a genuine attempt to define and interpret such "strengths" has been successfully accomplished in cases not involving the retail industry we have not explored in detail. However, in retail store situations, an examination of Board decisions reveals that the "analysis" is little more than a recitation of an empty litany, attempting to justify a result which would establish an easement in each and every instance on store-owned or leased parking lots, permitting almost unconditional access by non-employee union representatives.

In each of the following cases, the retailer owned either a fee-simple or a lease interest in the parking lot and other adjacent premises. In every instance, the Board held that the employer could not restrict the union's distribution of literature on the store-owned or leased

premises, although in each case the employer had appropriately enforced the restriction on like distribution by all others.

In *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. 1331 (1989), the union publicity was "area standards" handbilling, protesting the use by the retailer of a non-union maintenance crew to perform painting work.

In *Mountain Country Food Store Inc.*, 292 N.L.R.B. No. 100, 130 L.R.R.M. 1329 (1989), the non-employee union representatives handbilled in support of a strike being conducted by the union at a Coca Cola bottling plant. The handbills urged consumers to boycott products sold at the store which had been distributed by the struck bottling company.

In *Dolgin's, a Best Company*, 293 N.L.R.B. No. 102, 131 L.R.R.M. 1159 (1989) the non-employee union representatives handbilled, protesting the fact that the retailer had engaged to perform store remodeling work by non-union contractors. The handbilling was of the "area wage standards" variety.

In *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. 1325 (1989) the handbilling and picketing by non-employee union representatives publicized the union's claim that the store owner had committed and had not yet remedied certain unfair labor practices. The publicity urged consumers not to patronize the store. The union picketed on a public grassy island<sup>2</sup> but did not handbill from the island, allegedly because of safety considerations.

---

<sup>2</sup> The union had also been permitted by the store owner to picket certain designated areas near the store.

In *Century Markets, Inc.*, 296 N.L.R.B. No. 5, 132 L.R.R.M. 1001 (1989), the non-employee union representatives distributed handbills supporting the union's dispute with a meat packing company, asking customers to boycott products made by the struck packing company.<sup>3</sup> Picketing had taken place on public property adjacent to the entrance of the shopping center. Alternative means of communication, including newspaper advertising, direct mail and hand-delivery in neighborhoods was, as this court concluded in *Babcock & Wilcox*, "at hand." *Id.* at 113.

In *Target Stores*, 300 N.L.R.B. No. 136, \_\_\_ L.R.R.M. \_\_\_ (1990), non-employee union representatives were permitted to distribute handbills on store-owned or leased premises at two out of three Target stores. The handbilling was of the "area wage standards" variety, protesting that a general contractor performing remodeling work for Target used non-union carpenter subcontractors.

This undeviating decisional pattern requiring store owners to open their parking lots to non-employee representatives has been subject to exceptions in only three cases which our research has revealed. The circumstances in each were rare and unusual.

In *Target Stores*, 300 N.L.R.B. No. 136, \_\_\_ L.R.R.M. \_\_\_ (1990), Target was permitted to prohibit handbilling on leased premises at the third of three Target stores because there was available to the union a large public

<sup>3</sup> The respondent had allowed the Salvation Army to solicit funds during the holiday season, but this was found by the Board not to have been a significant dilution of respondent's property interest.

grassy area conveniently located near the entrance through which most Target shoppers passed.

In *Red Food Stores, Inc.*, 296 N.L.R.B. No. 62, 132 L.R.R.M. 1164 (1989) "area standards" picketing and handbilling was found not violative of the Act because the union representative who organized the picketing and handbilling admitted that he was totally unaware of what wages and benefits were in fact enjoyed by the employees of the store, and had no idea whether they were comparable to area standards. In addition, the second purpose of the picketing there was to protest the store's foreign ownership. This the Administrative Law Judge found to be an "appeal to nativistic prejudice" and against public policy. While the Board did not affirm his public policy finding, it was careful to make note of the fact that picketing and handbilling for that purpose was not activity protected by the Act.

In another exceptional set of circumstances, a retailer owner was justified in prohibiting handbilling on property owned by the store *Rockway, a Division of Federated Department Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. 1362 (1989). The "area standards" handbilling protested the use of non-union contractors at a location where construction work was no longer occurring. The Board found it unnecessary to decide whether such handbilling was for an unlawful "hot cargo" purpose but held that the union's rights were "weak."<sup>4</sup>

<sup>4</sup> In *Tecumseh Food Land*, 294 N.L.R.B. No. 37, 131 L.R.R.M. 1365 (1989), a store owner was found justified in restricting, but not prohibiting, the union's activities. The owner prohibited the

(Continued on following page)



These cases conclusively demonstrate that the Board has isolated retail facilities from *Babcock & Wilcox* criteria, and is instead, with very rare exceptions, requiring retailers to make their owned or leased parking lots available to non-employee representatives for all commonly used types of handbilling and picketing. Any analysis of the "strengths" of the union interests, based on the *objectives* of the distributions may fairly be described as superficial, if not a sham rhetorical exercise.

The Board has ceased to follow the *Babcock & Wilcox* precedent pursuant to which, as this Court observed in *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977), (N. 41, at 205):

In the absence of discrimination, the union's asserted right of access for organizational activity had generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees. *NLRB v. S & H Greenbags, Inc.*, 372 F.2d 26 (2d Cir.1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6 Cir.1948).

---

(Continued from previous page)

union from having gatherings of five people in a small area immediately adjacent to the store's entrance and from impeding the flow of traffic by stationing a handbiller in the center of the respondent's driveway. Otherwise the owner had permitted the union to utilize the store's property for picketing and handbilling, and, indeed, permitted the union representative to park their cars on the stores, parking lot which was normally restricted to use by customers. This case is in substantial degree inapposite. We include it only in the interest of completeness.

Neither in the instant case nor in any of the above decisions can there fairly be said to exist the "unique obstacles to nontrespassory methods of communication" present in the cases cited in the *Sears* footnote. Instead, in all these cases, as in *Babcock & Wilcox*, the various instruments of publicity were "at hand." Unions, however, naturally preferred to use the parking lots owned by retail stores, because they are the most convenient means with which to contact both customers and employees. But, we respectfully submit, it was not the purpose of this Court in *Babcock & Wilcox*, to require retailers to provide non-employee representatives the *most convenient* or the *most effective* means of communication with a retailer's customer or employees.

The Court of Appeals for the Eighth Circuit concluded, on remand, in *Central Hardware Company v. NLRB* 468 F.2d 252 (1972):

Doubtless, solicitation on the parking lot was an easier approach to the employees than some of the other recognized means of union solicitation. However, this falls far short of meeting the union's burden of establishing that no reasonable means of communication with the employees existed other than solicitation on the parking lot. *Id.*; 255-6

And as the NLRB said in *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706:

We do not believe it wise or proper to adopt a "big city rule" and a different "smalltown rule" in applying *Babcock & Wilcox*, or to attempt to determine how big a city must be to justify the proposed differing application. Concededly, it may be more convenient and less expensive for the union to use the respondent's property for



the purpose of organizing the employees here involved. That was also true under the facts of *Babcock & Wilcox*. But the test established there was not one of relative convenience, but rather whether the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them. . . .<sup>5</sup>

These observations were quoted by the Court of Appeals in *Central Hardware v. N.L.R.B.*, 468 F.2d 252, 254 (8th Cir. 1972).

This Court specifically recognized, in *Babcock & Wilcox*, that non-employee union representatives "would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. There, as here, it would have been obviously more convenient for the union representatives if they were allowed to use the employer's property. That was not the test applied in *Babcock & Wilcox*.

It appears, however, to be the test adopted and currently applied by the NLRB, at least with respect to parking lots and other premises owned by retail stores. It has substituted the obverse doctrine that, except in very unique cases, retailers must open their property to non-employer union representatives. That is precisely the opposite of the *Babcock* rule, described in *Sears* as one

<sup>5</sup> It is also interesting to note that in the *Monogram Models* case, as in the instant case, the employer had refused to furnish the union with a list of employees names and addresses. That was found to be of no significance by the Board. 192 N.L.R.B. 705, 706-707.

restricting such permission to circumstances demonstrating truly unique obstacles to non-trespassory methods of communication.

We respectfully submit that the Board should not be allowed to change the law as laid down in this Court's precedents, at least in the absence of substantial operational changes that may have developed in the industry. We see no reference in any of the recent Board decisions to any such alleged changes in the operations of the retail industry.

**C. The NLRB's Retail Store Cases Represent an Attempt to Resurrect *Logan Valley* in Contravention of this Court's Decision in *Central Hardware Co. v. NLRB*.**

When one examines the retail store cases to which we have referred in this brief, it is hard to avoid the conclusion that what the Board is really doing is to again raise the ghost of *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) by applying *Logan Valley* principles to retail store NLRB cases. But this court made clear on the occasion of the Board's previous attempt, in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972) that this was not permissible. This court spoke:

The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted

infringement of long settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case. Id. at 547.

Although always reciting the litany of an alleged comparison of the relative strengths of employers and employees, (only derivatively, union) rights, the fact is that the NLRB has, in effect, adopted a *per se* rule pursuant to which retail stores are obligated to permit non-employee union representatives access to their parking lots and other employer-owned or leased premises adjacent to the stores. In doing so, the Board has regularly followed a *Logan Valley* type of analysis. It adopts fault-ridden reasoning such as the following:

The record disclosed that the shopping center is open to anyone who wants to enter and in fact the public is so invited. *Target* does not permit pedestrians from cutting across its property. While *Target* maintains and enforces a no-solicitation, no-distribution rule, a factor strengthening its property interest, the strength of that interest becomes less compelling when noting otherwise the open and public nature of that business property. *Target Stores*, 300 N.L.R.B. No. 136, at page 16 of the Slip Opinion.

We respectfully submit that this ill-concealed attempt on the part of the Board to resurrect the *Logan Valley* concept and its failure to apply *Babcock & Wilcox* principles to retail stores needs, once more, to be rejected by this Court. One would have thought that this Court's decision in *Central Hardware* made that rejection plain for all to see. The Board seems not to have seen it. The

principles of this Court's *Central Hardware* decision appear to require reaffirmation and warrant a reversal of the decisions of the NLRB and the First Circuit here.

---

### CONCLUSION

For the reasons set forth above, the National Retail Federation, as Amicus Curiae, supports the petition for a Writ of Certiorari filed by Petitioner here, and respectfully submits that said petition should be granted.

Respectfully submitted,

JOHN W. NOBLE, JR.  
POPE, BALLARD, SHEPARD &  
FOWLE, LTD.  
69 West Washington Street  
Chicago, Illinois 60602-3069  
(312) 214-4200

Counsel for Amicus Curiae,  
National Retail Federation

February 14, 1991

(14)  
No. 90-970

Supreme Court, U.S.  
FILED

JUN 24 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

LECHMERE, INC.,

v.

*Petitioner,*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AND FOR LOCAL UNION 919, UNITED FOOD AND  
COMMERCIAL WORKERS, AFL-CIO, AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT**

J. WILLIAM GAGNE  
207 Washington Street  
Hartford, CT 06106-2400

GEORGE R. MURPHY  
PETER J. FORD  
1775 K Street, N.W.  
Washington, D.C. 20006

DAVID SILBERMAN  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



**BEST AVAILABLE COPY**

35



## TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	5
I. THE <i>JEAN COUNTRY</i> STANDARD .....	5
II. THE NLRB'S APPLICATION OF <i>JEAN COUNTRY</i> .....	16
CONCLUSION .....	30

## TABLE OF AUTHORITIES

CASES	Page
<i>American Hospital Assn. v. NLRB</i> , — U.S. —, 59 L.W. 4331 (April 23, 1991) .....	15, 30
<i>Aboud v. Detroit Board of Education</i> , 431 U.S. 209 (1977) .....	23
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978) .....	5, 7, 9
<i>Bill Johnson's Restaurants Inc. v. NLRB</i> , 461 U.S. 731 (1983) .....	7
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972) .....	<i>passim</i>
<i>Chugach Alaska Fisheries</i> , 295 NLRB No. 8, 132 LRRM (BNA) 1197 (June 15, 1989) .....	17
<i>Consumer Products Safety Commission v. GTE Sylvania</i> , 447 U.S. 102 (1980) .....	5
<i>Eastex Inc. v. NLRB</i> , 437 U.S. 556 (1978) .....	<i>passim</i>
<i>Emery Realty Inc. v. NLRB</i> , 863 F.2d 1259 (6th Cir. 1988) .....	14
<i>Emporium Capwell Co. v. Community Organization</i> , 420 U.S. 50 (1975) .....	6
<i>Excelsior Underwear Inc.</i> , 156 NLRB 1236 (1966) .....	21
<i>Fairmont Hotel Co.</i> , 282 NLRB 139 (1986) .....	12, 13
<i>G.W. Gladders Towing Co.</i> , 287 NLRB 186 (1987) ..	20
<i>Holland, Rantos Co.</i> , 234 NLRB 726 (1978), <i>enf'd</i> , 583 F.2d 100 (3d Cir. 1978) .....	20
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976) .....	11, 12, 16
<i>Jean Country</i> , 291 NLRB No. 4 (1988) .....	<i>passim</i>
<i>Labor Board v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 106 (1956) .....	<i>passim</i>
<i>Labor Board v. Exchange Parts Co.</i> , 375 U.S. 405 (1964) .....	7
<i>Laborers' Local Union No. 204 v. NLRB</i> , 904 F.2d 715 (D.C. Cir. 1990) .....	12, 14
<i>Le Tourneau Co.</i> , 54 NLRB 1253 (1944), <i>aff'd sub nom, Republic Aviation Corp. v. Board</i> , 324 U.S. 793 (1945) .....	16, 18, 21
<i>NLRB v. Baptist Hospital Inc.</i> , 442 U.S. 773 (1979) .....	9

## TABLE OF AUTHORITIES—Continued

	Page
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) ..	17
<i>Peyton Packing Co.</i> , 49 NLRB 828 (1943) .....	8, 9
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 24 (1980) .....	28, 29
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225 (1956) .....	23
<i>Republic Aviation Corp. v. Board</i> , 324 U.S. 793 (1945) .....	9, 22, 28, 29
<i>Richway</i> , 294 NLRB No. 49, 131 LRRM (BNA) 1365 (May 31, 1989) .....	17
<i>S &amp; H Grossinger's Inc.</i> , 156 NLRB 233 (1963), <i>enf'd</i> , 372 F.2d 26 (2d Cir. 1967) .....	20
<i>Scott Hudgens Co.</i> , 230 NLRB 414 (1977) .....	20
<i>Seamprufe Inc.</i> , 109 NLRB 24 (1954), <i>enf. denied sub nom., Labor Board v. Babcock &amp; Wilcox Co.</i> , 351 U.S. 105 (1956) .....	9
<i>Sears, Roebuck &amp; Co. v. Carpenters</i> , 436 U.S. 180 (1978) .....	17
<i>SNCO Barge Lines</i> , 287 NLRB 169 (1987), <i>aff'd sub nom., National Maritime Union of America v. NLRB</i> , 867 F.2d 767 (2d Cir. 1988) .....	21
<i>Tecumseh Foodland</i> , 294 NLRB No. 32, 131 LRRM (BNA) 1365 (May 31, 1989) .....	17
<i>Textile Workers v. Darlington Co.</i> , 360 U.S. 263 (1965) .....	7
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945) .....	18
<i>Weyerhaeuser Timber Co.</i> , 31 NLRB 258, 264 (1941) .....	17

## STATUTES

National Labor Relations Act, as amended, 29 U.S.C. §§ 151 <i>et seq.</i>	
§ 7 .....	<i>passim</i>
§ 8(a) (1) .....	<i>passim</i>

## MISCELLANEOUS

Anderson, <i>State News Service</i> (April 19, 1990) ....	19
Cohen, <i>Costly Campaigns: Candidates Learn That Reaching the Voters is Expensive</i> , National Journal 782 (April 16, 1983) .....	20

## TABLE OF AUTHORITIES—Continued

	Page
Direct Marketing Association, 1989 Statistical Fact Book .....	22
Fischel, <i>Labor Markets and Labor Law Compared with Capital Markets and Corporate Law</i> , 51 U. Chi. L. Rev. 1061 (1984) .....	23
Getman, Union Organizing in the Public Sector, 53 U. Chi. L. Rev. 45 (1986) .....	24, 25
Getman, Goldberg & Herman, <i>Union Representation Elections: Law and Reality</i> (1976) .....	25
Gorman, <i>Basic Text on Labor Law</i> (1976) .....	6, 7
Hagstrom & Guskind, <i>Selling the Candidates</i> , National Journal 2619 (Nov. 1, 1986) .....	19
Hylton & Hylton, <i>Rational Decisions and Regulation of Union Entry</i> , 34 Vill. L. Rev. 145 (1989) ..	23
Karsh, Seidman & Lilenthal, <i>The Organizer and His Tactics: A Case Study in Unions and Union Leadership</i> , in J. Barbash (ed.), <i>Unions and Union Leadership</i> (1959) .....	17
Media Market Guide (Summer, 1991) .....	20
Note, <i>Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers</i> , 94 Yale L.J. 374 (1984) .....	11
Note, <i>Still as Strangers: Nonemployee Union Organizers on Private Commercial Property</i> , 62 Tex. L. Rev. 111 (1983) .....	10-11, 24, 25
Posner, <i>Some Economics of Labor Law</i> , 51 U. Chi. L. Rev. 988 (1984) .....	23
Schwarzman, <i>Political Campaign Craftsmanship</i> 156 (1984) .....	18, 20
Voss, <i>Union Organizing: Costs and Benefits</i> , 36 Ind. & Lab. Rel. Rev. 576 (1983) .....	23
Zielske, <i>The Remembering and Forgetting of Advertising</i> in C. Craig & B. Sternthal (eds.), <i>Repetition Effects Over the Years</i> (1986) .....	19

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

No. 90-970

LECHMERE, INC.,

v. *Petitioner,*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AND FOR LOCAL UNION 919, UNITED FOOD AND  
COMMERCIAL WORKERS, AFL-CIO, AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 labor organizations representing approximately 14,000,000 working men and women, and Local Union 919, United Food and Commercial Workers, AFL-CIO, the labor organization directly involved in this case, submit this brief *amici curiae* with the consent of the parties as provided for in the Rules of this Court.

**SUMMARY OF ARGUMENT**

I. The legal standard announced in *Jean Country*, 291 NLRB No. 4 (1988), is a proper exercise of the National Labor Relations Board's authority.

A. Section 8(a)(1) of the National Labor Relations Act makes it unlawful for an employer to "interfere with . . . employees in the exercise of the rights guaranteed in section 7" including the right to organize. This



prohibition reaches any conduct with the "likely effect" of frustrating § 7 rights unless the "business justification for the employer's action" outweighs the interference with the § 7 rights. It is the NLRB's function to strike this balance. Pp. 5-8 *infra*.

B. Whenever an employer exercises its property rights to preclude § 7 activity at the workplace, § 8(a)(1) is implicated. Thus, employers must allow their employees to engage in protected activity on the employer's property in non-working areas during non-working hours. But this Court has held that more weighty employer property interests are involved when non-employee union representatives seek access to the employer's property. And the Court has instructed the NLRB to accommodate that employer concern with the countervailing § 7 concern. Pp. 8-12 *infra*.

C. Initially the Board sought to achieve this accommodation by focusing on the availability of "reasonable alternative means" for the union to communicate its message. But under that test relatively strong property rights were required to yield to relatively weak § 7 rights where alternative means of reaching the audience were lacking. To avoid that anomaly the Board decided to first "weigh the relative strength of each party's claim" and examine "alternative means" only when "the respective claims are relatively equal in strength." But that approach allowed weaker property interests to be overcome by more compelling § 7 interests even where property access was unnecessary to the exercise of the § 7 right. Accordingly, in *Jean Country* the Board announced that it would balance "the degree of impairment of the Section 7 right if access should be denied . . . against the degree of impairment of the private property right if access should be granted." Pp. 12-14 *infra*.

D. The *Jean Country* standard is rational and consistent with the Act. That standard, first of all, accords with the general learning as to the meaning of § 8(a)(1).

And *Jean Country* factors into the balance all the relevant considerations, including the employer's interest in controlling access to its property. Petitioner's claim that the Board must "skew[]" the balance "in favor of private property rights" is inconsistent with the text of the Act, its history, and the decisions of this Court. Pp. 14-16 *infra*.

II. The Board acted rationally in applying *Jean Country* to permit union access to non-working areas of an employer's property that is open to the public generally where the union seeks to organize employees who, upon leaving work, are dispersed within a large metropolitan area.

A. Organizational rights lie at the "very core of the purposes for which the NLRA was enacted." The employees' right to organize includes "full freedom to receive aid, advice and information from others" as "organizational rights are not viable in a vacuum" and the role of the organizer is "essential to the free exercise of organization rights." Pp. 16-18 *infra*.

B. (1) Depriving organizers of access to employer property would severely impair organizing. In a large metropolitan area, advertising through the mass media is simply too expensive to be a viable means of communicating with a relatively small employee group. And in that setting, attempting to identify the employees and contact them individually is labor intensive work which also entails heavy costs. The already-organized who, as a practical matter, must finance organizing, simply cannot afford these costs. Pp. 18-24 *infra*.

(2) The alternatives to worksite communications are, moreover, of limited value. Advertising does not allow for the interaction and the dialogue critical to the organizing process. And individualized communication is of questionable utility because of the difficulty of securing the attention of the "swing" group of employees at their

homes and because this method of approach defeats the organizer's central message as to the possibilities of collective action. Indeed, denying the organizer access to property that is open to the public generally communicates a powerful anti-union message to the employees. Pp. 24-26 *infra*.

(3) This conclusion does not conflict with *Babcock & Wilcox*. That case invites an inquiry into the "reasonableness" of the alternative means of communication, and as Judge Selya recognized below "reasonableness is a concept, not a constant." Furthermore, *Babcock & Wilcox* arose at a very different time and place and the Board functions in part to determine whether what may have been reasonable in small-town America in the mid-1950's is still reasonable in metropolitan America in the 1990's. Pp. 26-27 *infra*.

C. Against the severe impairment of § 7 rights that would result from denying property access in this context is the impairment of employer interests that would result from access. Allowing such access does *not* threaten any management interests of the employer. *Nor* does such access interfere with the employer's ownership, possession, use or enjoyment of his property or diminish the property's value. And allowing access in this context does not infringe the employer's right to control who comes onto his land since what is objectionable to the employer here is not the entry but the content of what the organizer says after entering. Thus, the only employer property interest implicated in this case is the employer's interest in controlling the conduct of an invitee on his property. And permitting access means only that for a relatively brief period of time the employer must allow the organizer to engage in activity which the employer must in any event suffer on his property when carried on by employees. This is far less an intrusion on the employer's interests than exclusion would be on § 7 interests. Pp. 27-30 *infra*.

## ARGUMENT

The question presented here is whether the respondent National Labor Relations Board ("NLRB" or "the Board") acted within the limits of its authority in ruling that petitioner Lechmere, Inc. ("Lechmere" or "the Employer") violated § 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) ("NLRA" or "the Act").

The Labor Board ruled that Lechmere "interfere[d] with . . . the rights granted [in NLRA] Section 7" in contravention of § 8(a)(1) by denying organizers for Local 919, United Food and Commercial Workers Union ("the Union"), access to the open nonworking areas of the Employer's property for the purpose of communicating with employees regarding the desirability of forming a union.

Petitioner and its supporting *amici curiae* challenge both the legal standard announced by the Board in *Jean Country*, 291 NLRB No. 4 (1988), for resolving issues of this type, as well as the manner in which that standard has been applied by the Board here and in like cases. We address these two issues *seriatim*.

### I. THE JEAN COUNTRY STANDARD

The NLRA confers upon the Labor Board the "authority to formulate rules to fill the interstices of the broad statutory prohibitions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). Thus, insofar as petitioner challenges the legal rule applied by the Board the question posed here is whether that rule is "consisten[t] with the Act." *Id.* Consideration of that question necessarily begins with the language of the statute. *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

A. Section 7 of the NLRA provides in pertinent part as follows:



Employees shall have the right to self-organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section thus "affirmatively guarantees employees the most basic rights of industrial self-determination." *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 61 (1975).

To safeguard these "basic rights," NLRA § 8(a), 29 U.S.C. § 158(a), condemns as unfair labor practices the various types of employer conduct that Congress deemed incompatible with the free exercise of § 7 rights. Sections 8(a)(2)-(a)(5) define with some specificity the type of conduct condemned. Section 8(a)'s first subsection—the one at issue here—does not; in "very broad language," R. Gorman, *Basic Text on Labor Law*, 132 (1976), § 8(a)(1) makes it an unfair labor practice for an employer

to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

Over the years, this Court has on numerous occasions considered the application of § 8(a)(1)'s general prohibitions in various contexts in which, as the Court has put it, employees or unions have "engaged in conduct inconsistent with traditional notions of private property rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The legal dispute here in large measure consists of tendentious argumentation as to how those decisions *taken in isolation* are to be parsed. But these "property" cases are part and parcel of a broader jurisprudence concerning the sweep of § 8(a)(1)'s language and cannot be understood apart from that jurisprudence. We thus briefly review the salient teachings of the Court's § 8(a)(1) decisions generally before turning to the "property" cases specifically.

*First*, to begin with the basics, the Court has made explicit what is clear on the face of the statute: *viz.*, that "Section 8(a)(1) . . . [is a] broad, remedial provision[]," *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 740 (1983), whose "purpose . . . is to establish 'the right of employees to organize for mutual aid' without employer interference," *Labor Board v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Given its breadth, § 8(a)(1) reaches not only employer conduct motivated by an intent to penalize or discourage § 7 activity, but any conduct which "has the likely effect" of interfering with, restraining or coercing the exercise of § 7 rights. *Bill Johnson's Restaurants*, 461 U.S. at 740.

*Second*, the Court has made it equally clear that not every employer action that falls within the literal reach of § 8(a)(1) violates that section. "[I]t is only when the interference with section 7 rights outweighs the business justification for the employer's action that section 8(a)(1) is violated." *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965). As Professor Gorman has summarized the resulting legal rule:

Thus construed, section 8(a)(1) requires that the Board strike a balance between the interests of the employer—which are not specifically accorded weight in the statute but which Congress surely intended be considered in administering a statute designed to further industrial peace and efficiency—and the interests of employees in a free decision concerning their collective bargaining activities. [R. Gorman, *supra*, at 133.]

*Third, and finally*, "[b]ecause it is the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" the "function of striking th[e] balance" required by § 8(a)(1) is "committed primarily to the National Labor Relations Board." *Beth Israel Hospital v. NLRB*, *supra*, 437 U.S. at 500-01. "The judicial role is



narrow: the rule which the Board adopts is judicially reviewable for consistency with the Act and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Id.* at 501.

B. Against this background, we now examine the problems that can arise—and have arisen—where, as here, there is a clash between "traditional notions of private property rights," *Central Hardware Co. v. NLRB*, *supra*, 407 U.S. at 543, and the exercise of § 7 rights.

(1) At the threshold, it is clear that given its broad reach, § 8(a)(1) is implicated whenever an employer exercises its property rights to preclude § 7 activity on the employer's property. As Justice Powell wrote for the Court in *Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978), the workplace is

a particularly appropriate place for [the exercise of § 7 rights] because it 'is the place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

Thus, to declare a workplace off-limits for § 7 activity clearly impedes—and in the literal language of the statute "interferes with"—the exercise of § 7 rights.

From the very first the Labor Board has so recognized and, in accord with its general obligation under § 8(a)(1), has sought to reconcile the § 7 interests of employees with the countervailing interests of employers. In its seminal decision in *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), the Board held that

It is . . . not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to

self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

At the same time, in deference to the legitimate interest of employers in regulating "the conduct of employees on company time," the Board ruled that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Id.* at 843.

In *Republic Aviation Corp. v. Board*, 324 U.S. 793 (1945), a group of employers challenged the balance struck by the Board in *Peyton Packing Co.* as inconsistent with the Act. This Court rejected that challenge and sustained the *Peyton Packing* rule as one embodying a rational "adjustment between the undisputed right of self-organization assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-98.<sup>1</sup>

(2) In the years following *Republic Aviation*, the Labor Board applied the rules endorsed therein to determine the rights of employees *and* of non-employee union organizers alike to engage in § 7 activity at the workplace. The Board reasoned that

To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation. [*Seamprufe, Inc.*, 109 NLRB 24, 32 (1954), *enf. denied sub nom. Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).]

In *Labor Board v. Babcock & Wilcox Co.*, *supra*, however, the Court in reversing the Board, concluded that there is a "distinction . . . of substance," between cases involving restrictions on what *employees* can do on the

<sup>1</sup> See also *Beth Israel Hospital v. NLRB*, *supra*; *Eastex Inc. v. NLRB*, *supra*; *NLRB v. Baptist Hospital Inc.*, 442 U.S. 773 (1979).

employer's property, and cases involving restrictions on property access by *non-employee* union organizers. 351 U.S. at 113.

That distinction does *not* rest on any supposition that a property restriction on non-employees is any less an interference with § 7 rights than a property restriction on employees. To the contrary, the Court has recognized that communications between employees and non-employee organizers is "essential to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, *supra*, 407 U.S. at 543. See also p. 11, *infra*.<sup>2</sup>

The distinction identified by the *Babcock & Wilcox* Court thus relates entirely to the *other* side of the ordinary § 8(a)(1) equation: *viz.*, to the countervailing employer interest involved. "The difference was that the non-employees in *Babcock & Wilcox* sought to trespass on the employer's property whereas the employees in *Republic Aviation* did not." *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 571.<sup>3</sup>

<sup>2</sup> The Chamber of Commerce thus could not be more wrong in imputing to the Court the view that nonemployee organizers play an "ancillary role" and in arguing that "the Board and the First Circuit began with an erroneous premise," Br. at 8-9.

<sup>3</sup> The commentators have sharply criticized the *Babcock & Wilcox* Court's understanding of the common law of property:

At common law, employees had no right to use the workplace for their own purposes; every day of their working time they were bound by the condition of entry imposed by the employer. An employee had no more right to engage in union activity on private property than a non-employee had to enter the property for the same purposes. Both were potential trespassers.

Both intrusions offend the employer's property interest in the same manner: he is made to suffer the presence of unwanted union activity on his property. It is a purely formal distinction that denies protection to one species of trespassory activity because it is a trespass *ab initio* but privileges the other merely because the trespassing activity occurs a few minutes or hours after the employees are already rightfully on the property. [Note, *Still as Strangers: Nonemployee Union Organizers on*

Given the *Babcock & Wilcox* Court's view that different and more weighty employer interests are implicated when non-employees seek property access, the Court ruled that a different balance is required:

This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.* [351 U.S. at 112; emphasis added.]

The Court reaffirmed this "guiding principle" in *Central Hardware Co. v. NLRB*, *supra*, and again in *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976), where the Court added the following:

Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two." *Central Hardware Co. v. NLRB*, 407 U.S. [539,] 543 [1972]. What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted.

\* \* \*

*Private Commercial Property*, 62 Tex. L. Rev. 111, 164-65 (1983).]

See also Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 Yale L.J. 374, 379-80 (1984) ("The employer is asserting a property right to control not merely access to, but more importantly use of, company property. . . . The artificial invitee-trespasser distinction thus veils the fact that, from the point of view of the employer, all workplace solicitation is trespass"); *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 581-82 (Rehnquist, J., dissenting) ("both *Babcock* and *Republic Aviation* involved a 'trespass on the employer's property' in that unions sought to override the employer's right to prescribe the conditions of entry to its property. . . . The employer has a property right to decide not only who shall come on his property but also the conditions which must be complied with to remain there.").



The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights “with as little destruction of one as is consistent with the maintenance of the other.” The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.

(3) Since *Babcock and Wilcox* and *Hudgens*, the Board has endeavored, in a variety of property-access contexts, to strike the “accommodation” mandated by this Court.

Initially, the Board read *Babcock & Wilcox* as requiring an all-but-exclusive reliance on the availability of “reasonable alternative means” for the union to communicate its message. Compare 351 U.S. at 111-12. But, over time, the Board came to realize that this narrow focus led to a set of anomalous results. The conceptual problem, as the D.C. Circuit has recently put it, is that

There is an inverse relationship between the centrality of a section 7 right and the availability of alternative means of exercising the right. As the right a union seeks to advance becomes less central and the union’s asserted audience becomes larger (e.g. ‘consumers’ of a product rather than ‘employees’ of the producer) and less connected to the core dispute, alternative means of reaching the asserted audience become more scarce. [*Laborers Local 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir., 1990).]

Accordingly, in *Fairmont Hotel Co.*, 282 NLRB 139 (1986), the Board formulated a somewhat different approach to the “accommodation” mandated by *Babcock & Wilcox* and *Hudgens*. To minimize the risks that “relatively strong claims of private property rights would be required to yield to relatively weak claims of Section 7 rights” on the ground that there was a “lack of alterna-

tive means,” 282 NLRB at 147, the Board there ruled that

in cases such as the instant one, it is the Board’s task first to weight the relative strength of each party’s claim. If the property owner’s claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative. [*Id.*]

Again, however, experience proved the *Fairmont Hotel* approach less than entirely satisfactory. That approach permitted weaker property interests to be overcome by “more compelling” § 7 interests *even where “access is totally unnecessary to the exercise of the [§ 7] right.”* *Jean Country*, *supra*, slip op. at 6 (emphasis added). Concluding that such a result is inconsistent with its mandate to “permit[] infringements on one right only to the extent necessary to maintain the other,” *id.*, the *Jean Country* Board determined that “further clarification of the Board’s approach in access cases is necessary,” *id.* at 2.

Specifically, *Jean Country* concludes that instead of evaluating only the “relative strength” of the § 7 right at issue, the appropriate focus is on “the degree of impairment of the Section 7 right if access should be denied,” *id.* at 9, a focus that necessarily entails a close examination of “the availability of reasonable alternative means . . . in every access case,” *id.* at 3. The *Jean Country* Board determined further to examine “the degree of impairment of the private property right if access should be granted.” *Id.* at 9. The Board thus formulated the following legal standard:

[I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of



impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [*Id.*]

C. The foregoing establishes that, as Judge Selya concluded for the court below, the *Jean Country* rule “affords a useful analytic model for resolution of access-to-property cases” and is fully “in tune with the Act.” 914 F.2d at 321.<sup>4</sup>

*Jean Country* is firmly grounded in § 8(a)(1)’s formulative principle: *viz.*, that employer conduct which, in a literal sense, “interferes” with the exercise of § 7 rights is proscribed by § 8(a)(1) if, but only if, the interference “outweighs the business justification.” Pp. 5-8 *supra*. At the same time, *Jean Country* factors into the balance the employer interest which the Court stressed in *Babcock & Wilcox* and which the Board had previously discounted: *viz.*, the employer’s interest in controlling access to its property. Indeed, by focusing attention on the relative degree of impairment of the competing § 7 and employer interests, *Jean Country* calls for a finely calibrated balancing of the critical variables.

Insofar as petitioner and its supporting *amici curiae* challenge the *Jean Country* rule, they are reduced to advancing the unlikely contention that—in contrast to all other types of § 8(a)(1) cases—the Act does not permit the Board to decide property-access cases by balancing the competing § 7 and employer interests. That proposition does not withstand analysis.<sup>5</sup>

<sup>4</sup> See also *Laborers’ Local Union No. 204 v. NLRB*, 904 F.2d 715, 718 (D.C. Cir., 1990) (*Jean Country* “sensibly continues the Act in light of High Court precedent”); *Emery Realty Inc. v. NLRB*, 863 F.2d 1259, 1264 (6th Cir. 1988).

<sup>5</sup> In addition to challenging the *Jean Country* rule on its face, petitioner and its *amici curiae* complain that in applying that rule, the Board too readily finds that the alternatives to workplace communication are ineffective and that the Board does not give sufficient

(1) Petitioner contends that in balancing § 7 rights against property rights, the Board is not free to afford “each right . . . equal weight”; rather, according to Lechmere, “the balance must be skewed in favor of private property rights.” Pet. Br. at 20.

Significantly, Lechmere points to nothing in the text of the Act—which, to repeat, in terms prohibits *any and all* “interfere[n]ces with . . . the exercise of” § 7 rights—that somehow strikes this balance in the favor of employers. Nor does the Employer cite anything in the Act’s evolution or legislative history to support the claim that this statute, which was enacted “to protect and *facilitate* employees’ opportunity to organize,” *American Hospital Assn. v. NLRB*, — U.S. —, 59 L.W. 4331, 4332 (April 23, 1991) (emphasis added), uniformly subordinates federal statutory rights to common law property rights. And, although Lechmere seeks to derive comfort from *Babcock and Wilcox*, Pet. Br. at 20, the rule stated in that case is *entirely neutral*: “Accommodation between the two [§ 7 rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.” 351 U.S. at 112.

The argument of the Chamber of Commerce, in its *amici curiae* brief, is, on the surface, less bold. The Chamber concedes, Br. at 12 n.15, that “[a]n examination of the nature and strength of the respective rights at issue may at times be necessary.” But the Chamber contends that such an examination is appropriate only if it is first determined that “the union lacks alternative means for communicating its message.” *Id.* In other words, it is the Chamber’s view that where a union has *no* reasonable alternative, access may still be denied based on the “nature and strength of the respective rights,” but that where such alternatives exist, the employer is al-

weight to the employer’s property right to restrict the activities of invitees generally. These arguments—which relate not to the rule itself but to the manner of its application—are addressed in Part II of our Argument.

ways free to deny access. Heads the employer wins, tails the employees lose.

This is not "accommodation"; it is simply a warmed-over version of Lechmere's contention that "the balance must be skewed in favor of private property rights." And the Chamber is no more successful than Lechmere in identifying anything in the text of the Act or its background that supports—let alone compels—that result.<sup>6</sup>

## II. THE NLRB'S APPLICATION OF *JEAN COUNTRY*

In *Hudgens v. NLRB*, *supra*, the Court, after reaffirming that "the basic objective under the Act [is] accommodation of § 7 rights and private property rights," went on to conclude that the "locus of that accommodation . . . may fall at differing points along the spectrum" in different cases and that "[i]n each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522.

The instant case is illustrative of one such "generic situation:" *a union seeks access to the non-working areas of an employer's property that is open to the public in an effort to communicate on organization with employees who, upon leaving work, are dispersed within a large metropolitan area.* The Board's decision permitting ac-

<sup>6</sup> The Chamber's brief suffers from a second, critical flaw: the Chamber assumes throughout that in every case there is an objective, yes or no answer, to the question whether "reasonable efforts by the union through other available channels of communication will enable it to reach the [audience] with its message," *Babcock & Wilcox*, 351 U.S. at 112 (emphasis added), or whether, *per contra*, "the inaccessibility of [the audience] makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels," *id.* (emphasis added). The Chamber's assumption is simply false. As *Jean Country* recognizes, slip op. at 8, the determination of whether a particular alternative means of communication constitutes a "reasonable alternative" is a question of judgment and of degree which is best resolved through a balancing process.

cess in this "generic situation" is a sound—and in all events, a rational—elaboration of the NLRA.<sup>7</sup>

A. It is very much to the point that the § 7 "right to organize" at issue here—which lies "at the very core of the purpose for which the NLRA was enacted," *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 206 n.42 (1978)—encompasses not only the right of employees to discuss organization among themselves but equally "full freedom to receive aid, advice, and information from others concerning these rights and their full enjoyment," *Weyerhaeuser Timber Co.*, 31 NLRB 258, 264 (1941).

Organizations—like organisms—do not come to life by spontaneous generation; both grow from seeds that must be nurtured. In the union context, that is the role of the organizer.

Forming a union is an act of self-assertion—of independence—on the part of the employees. Given "the economic dependence of . . . employees on their employer and the insecurity that the employment relationship breeds," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), it takes considerable knowledge, and vision as to the possibilities, of collective action for unorganized employees to come together to form a union.

The organizer strives to transmit that knowledge and to engender that vision. "[F]inding general individual unrest," the organizer "seeks to transform it into a collective condition and to channel it into the direction of group action." Karsh, Seidman & Lilenthal, *The Organizer and His Tactics: A Case Study* in J. Barbash (ed.), *Unions and Union Leadership* 94 (1959).

<sup>7</sup> While the Board has likewise allowed access in some other "generic situations," Lechmere overstates its case in contending that under *Jean Country* "[i]nfringement on property rights has become the rule." Pet. Br. at 35. Lechmere's own citations so prove. See *id.* at 35 n.9; see also *Tecumseh Foodland*, 294 NLRB No. 32, 131 LRRM (BNA) 1365 (May 31, 1989); *Richway*, 294 NLRB No. 49, 131 LRRM (BNA) 1362 (May 31, 1989); *Chugach Alaska Fisheries*, 295 NLRB No. 8, slip op. at 6, 132 LRRM (BNA) 1197 (June 15, 1989).



From the very first, the Labor Board has therefore recognized that

employees cannot realize the benefits of the right to self-organization guaranteed them by the Act unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization and may have opportunities for the interchange of ideas necessary to the exercise of their right of self-organization. [*Le Tourneau Co.*, 54 NLRB 1253, 1260 (1944), *aff'd sub nom. Republic Aviation Corp. v. Board*, *supra*.]

This Court has concurred; Justice Powell, writing for the Court in *Central Hardware Co. v. NLRB*, *supra*, explained:

[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights. [407 U.S. at 543] \*

In sum, the ability of union organizers to "provide information" regarding unionization is "essential to the free exercise of organization rights." *Id.*

B. As the Board found in this case, where employees, upon leaving work, disperse in a large metropolitan area, depriving union organizers of the ability to communicate with the employees at the workplace (in non-working areas open to the general public during non-working time) would "severely impair" the ability of the organizers to provide information "essential to the free exercise of organization rights." *Jean Country*, *supra*, slip op. at 9. A review of the possible ~~various~~ methods of communication shows why this is so.

\* See also *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Babcock & Wilcox*, 351 U.S. at 113.

(1) The union organizer, by definition, has a *limited audience* to reach: the employees of a particular employer. In the ordinary case—including this one—moreover, the organizer does *not* know the identity of the individual members of this audience. And upon leaving work the individual employees become lost within a large universe of persons.

In the absence of access to the workplace, the organizer who wishes to reach the employees faces two choices: the organizer either must communicate with the entire area population in order to reach the employee group or the organizer must find some way of identifying and communicating with each of the individual employees. In the real world of affairs, each option is riddled with difficulties.

(a) The first option open to an organizing union, at least in theory, would be to use the mass media to reach the entire area population, including the employee group. But where the organizing effort takes place in a large metropolitan area, this option, by definition, requires the union to incur the costs of communicating with hundreds of thousands of people in order to reach a handful of persons. And the union, like any other advertiser, could not be certain that at any given moment in time the intended audience would notice the advertisement.

To make the mass media work, therefore, the union, like any other advertiser, would need to purchase repeat exposures of its advertisement to have any reasonable chance of reaching the intended audience with its organizing message. Indeed, as a rule of thumb, advertisers believe that to reach an audience an advertisement must run at least five to ten times, and political candidates run their advertisements much more frequently.<sup>9</sup>

<sup>9</sup> See Hagstrom & Guskind, *Selling the Candidates*, National Journal 2619, 2626 (Nov. 1, 1986); Ed Anderson, *State News Service* (April 19, 1990); see also Zielske, *The Remembering and Forgetting of Advertising*, C. Craig & B. Sternthal (eds.), *Repetition Effects Over the Years* 239 (1986).



The costs of such an advertising campaign in a major media market make it "wildly unreasonable" as Judge Selya aptly put it. 914 F.2d at 324.<sup>10</sup> Even candidates for congressional seats located within large metropolitan areas generally are advised to eschew mass media advertising because their target audience—voters in their district—is too small to justify mass media expenses.<sup>11</sup> *A fortiori*, the audience for an organizing campaign in all but the most extraordinary case is far too small to make advertising a viable alternative method of communication as the Board recognizes. See *Jean Country*, *supra*, slip op. at 7.<sup>12</sup>

<sup>10</sup> The Hartford metropolitan area, in which the instant case arises, is the twenty-third largest media market in the country (out of 209 markets). One "point" of prime time television in Hartford costs \$218. *Media Market Guide* (Summer, 1991). An effective advertisement would require at least 500 points. Hagstrom & Guskind, *supra* n.8. An inch of advertising space in The Hartford Courant costs \$168.85. *Media Market Guide*, *supra*.

<sup>11</sup> See Schwartzman, Political Campaign Craftsmanship 156, 160 (1984); R. Cohen, *Costly Campaigns: Candidates Learn that Reaching the Voters is Expensive*, National Journal 782 (April 16, 1983).

<sup>12</sup> In this regard, *Jean Country* accords with an unbroken line of NLRB and appellate court decisions. *E.g.*, *S & H Grossinger's Inc.*, 156 NLRB 233, 258 (1963), *enf'd*, 372 F.2d 26 (2d Cir. 1967); *Scott Hudgens Co.*, 230 NLRB 414, 416 (1977); *Holland, Rantos Co.*, 234 NLRB 726, 735-36 (1978), *enf'd*, 583 F.2d 100 (3d Cir. 1978), *G.W. Gladders Towing Co.*, 287 NLRB 186, 194 (1987).

In his dissenting opinion below, Judge Torruella asserted that "the crux" of *Jean Country* is "its balance-tipping dogma to the effect that barring 'exceptional cases,' the use of newspapers, radio and television will not be considered a feasible alternative to direct contact with the employees," and Judge Torruella argued that in so ruling the Board "declares inexistent and impotent 'the usual methods of imparting information' used by the entire advertising and publicity industry. This is a clearly unreasonable and arbitrary conclusion considering that these are the very tools normally used effectively by the political and commercial processes of this country . . ." 914 F.2d at 328.

Contrary to Judge Torruella, *Jean Country* does not declare these means of communication to be "inexistent" or "impotent"; *Jean*

(b) Absent access to the workplace, the only alternative to mass media open to a union seeking to communicate with the employees of a particular employer would be to attempt to identify those employees and to contact each employee individually. Doing so is all but impossible.

In the usual case, there is no readily available listing of employees and their addresses. Nor in large metropolitan areas is there a main street—or another central meeting place—at which the community at large, including the employees of a particular employer, congregate and can be found. Thus, to communicate individually with each employee the union must first ascertain the employees' names and addresses.

There are several ways this might be attempted where the employer is unwilling to give the union such a list.<sup>13</sup> A union can seek to "infiltrate" the employer's workplace and obtain names and addresses covertly through leaked information. Alternatively, a union can attempt to trace each employee as the employees arrive to or depart from work through, e.g., license plate numbers identified by the Department of Motor Vehicles. In either event, constructing the list of employees is labor intensive and time consuming, and is certain to produce only partial—and only partially correct—information.

*Country* says these methods are not "feasible alternatives." Slip op. at 7. And as shown in text, that judgment is not only entirely reasonable but is also in full accord with the practices of political and commercial advertisers.

<sup>13</sup> Under current law, employers must provide such a list *after* the NLRB directs a representation election but not before. See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

The Board has long recognized, however, that if the employer elects to provide such a list at an earlier point, that fact carries great weight in determining whether property access is necessary to effectuate § 7 rights. *E.g.*, *Le Tournau Co.*, *supra*, 54 NLRB at 1261 ("In the absence of a list of names and addresses, it appears that direct contact with the majority of the [employer's] employees away from the plant would be extremely difficult"); *SNCO Barge Lines*, 287 NLRB 169 (1987), *aff'd sub nom.*, *National Maritime Union of America v. NLRB*, 867 F.2d 767 (2d Cir. 1988).

Even if a list of employees—or more precisely, suspected employees—can be constructed, making use of the list is a daunting task. The very reason that the list is needed in the first place—the absence, in large metropolitan areas of a central meeting place—makes individual contacts of the essence.<sup>14</sup> The union can attempt a home visit to each employee on its list, but to do so—especially within a large metropolitan area—would demand a veritable army of organizers to travel from place to place throughout the metropolitan area.<sup>15</sup>

(c) In a world of unlimited resources, the foregoing could perhaps be readily dismissed in assessing the impact on § 7 rights of denying the union organizer access to the employer's property. But that is simply not the world in which we live.

Unorganized employees—who, at least in theory, could be expected to bear the costs of an organizing drive—

<sup>14</sup> Direct mail to the employees is not a satisfactory alternative because of the sizable likelihood that unsolicited mail would not be read by the recipients. Indeed, polling data indicates that only 41.9% of all Americans report that they "open and read" the direct mail they receive. Direct Marketing Association, *1989 Statistical Fact Book* 27. Telephone contact, too, suffers both from the defects discussed in the text and the fact that many recipients of unsolicited calls simply hang up on the caller at the outset as a matter of course.

<sup>15</sup> Lechmere complains, Pet. Br. at 23-31, that the Board failed to make a more particularized inquiry as to the feasibility of identifying employees and contacting them individually on the facts of this case. Even if that were true—and the Board's brief shows that there is substantial evidence in the record to support the Board's determination that those means of communication are not reasonable alternatives in this case—it would be of no legal consequence. The principal point of *Republic Aviation Corp. v. Board*, *supra*, is that the Board is not required to relitigate such issues in each and every case but rather can adopt presumptions based on its experience in the run of cases. Indeed, the Chamber's brief (at 14-25) convincingly demonstrates that speed and predictability of decision-making is of great importance in this area; those interests would be severely disserved if the Board were required to relitigate issues of this type in each and every case.

clearly do *not* have unlimited resources; indeed, the impetus for organization often is the low wages such employees are paid. Furthermore, organization, if successful, creates a "public good"; *viz.* a good whose benefit flows to all members of a group whether or not the individual member purchases the good. Thus, even if their resources were not limited, it would be unrealistic to expect individual workers to voluntarily make substantial investments of their private resources to support the creation of the organization.<sup>16</sup>

Nor do unions—the alternative and principal source of financing for organizing—have unlimited resources. Union derive their income from dues paid by already-organized workers who are themselves working men and women of modest means. And the dues unions receive must support the entire array of the union's activities including, most importantly, adequately representing the already-organized; these are "great responsibilities" which "entail expenditure of much time and money." *Aboud v. Detroit Board of Education*, 431 U.S. 209, 221 (1977).

These financial realities are underscored by two simple facts. First, as of 1980, union organizing costs were running at \$1,000 for every new member. Voss, *Union Organizing: Costs and Benefits*, 36 Ind. & Lab. Rel. Rev. 576, 583 (1983). That figure has not declined. Second, today only one worker out of six is a union member. And that figure is declining. The conclusion is inescapable. The "effectiveness [of organizing rights] depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."

<sup>16</sup> See Hylton & Hylton, *Rational Decisions and Regulation of Union Entry*, 34 Vill. L. Rev. 145, 154 (1989); Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U.Chi. L. Rev. 1061, 1072 (1984); *cf.* Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 994 (1984). Indeed, it is precisely because unions create "public goods" and open the doors to "free riders" that Congress left unions free to negotiate and enforce collective bargaining agreements requiring all members of the bargaining unit to finance the union's activities. See, e.g., *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).



*Central Hardware Co. v. NLRB*, *supra*, 407 U.S. at 543. The financial ability of the already organized to carry the burden of bringing that message to the unorganized is at the breaking point. To the extent the legal regime adds to those costs, it makes § 7's guarantee of the right to organize an empty promise.

(2) Costs aside, the alternatives to workplace communications do not in the usual case provide the union with a fair opportunity to make the case for organization.

Consider first the mass media. By spending enough advertising dollars, presumably a union could reach an unorganized group and communicate the union's message. But advertising, by definition, does *not* allow for interaction and discussion between the organizer and the unorganized employee. Yet, students of the organizing process have found that it is "crucial" for the organizer to "get[] to know th[e] employee[s] and what they care about" and for the employees to get "first hand" a "sense of the particular union involved in the campaign." Getman, *Union Organizing in the Public Sector*, 53 U. Chi. L. Rev. 45, 59, 71 (1986). As Judge Selya put it for the court below,

personal contact is an important part of any organizing effort. Whether to opt for a union, or not, is rarely a cut-and-dried proposition; there are pros and cons, the evaluation of which may be better suited to the dynamics of lively discourse than to the static impersonality of more remote approaches. [914 F.2d at 323.]

Individual communications with workers at their homes—assuming that, with enough time and expense, a list of the names and addresses of unorganized employees can be developed—does not suffer from the same defect as advertising. But "[t]he factors that work against effective communication in the employee's home are many and largely unavoidable." Note, *Still as Strangers*, *supra*, 62 Tex. L. Rev. at 159.

In the typical organizing campaign, there is a group of strong union adherents, a group of strong opponents,

and a middle group whose decisions are critical to the outcome of the campaign. See Getman, *supra*, 53 U. Chi. L. Rev. at 55-56. This group—like the "swing voters" in a political campaign—is unlikely to be pro-active in approaching the union. J. Getman, J. Goldberg & J. Herman, *Union Representation Elections: Law and Reality* 96 (1976). And especially with respect to this middle group, home visits, and home phone calls, are of questionable utility:

At the outset, some employees, whether because of fear, prejudice, or conviction, will refuse to talk to the organizer . . . In addition, the value of home visits as a tool for communicating information on self-organization and collective bargaining is diminished to the extent organizers find the employees distracted from the relationships and dissatisfaction of their working lives. At home, employees must attend to their responsibilities as parents, spouses, and consumers and are far removed from the work-related concerns that properly should guide them in matters affecting their organizational life. . . .

In a typical home visit, the employee receives the organizer in his powerless, anarchic solitude. Alone, and away from the situations that define the employment relationship, an employee may unreasonably doubt that collective action is desirable or even possible. He may be intimidated by the presence of a "stranger" organizer, especially if the employee is uneducated or inarticulate. He may think that his privacy has been invaded or that his free time is being wasted . . . [Note, *Still as Strangers*, *supra*, 62 Tex. L. Rev. at 159-60.]

Thus, to deny union organizers access to the workplace (in non-working areas open to the general public)—which, as already noted, is a "particularly appropriate place for the distribution of section 7 material," *Eastex Inc. v. NLRB*, *supra*, 437 U.S. at 574—and to relegate the organizer to alternatives which, by their very nature,



are far less effective means of forwarding the organizing process substantially diminishes the value of the § 7 right.<sup>15</sup>

(3) There is one final consideration that is very much to the point in evaluating the effect that denying workplace access would have on the exercise of § 7 rights. Even if the alternative means of communication were not so costly or of such questionable value, a rule which allowed employers to exclude union organizers from property which is open to the general public *inevitably communicates a powerful, anti-union message to the employees*. In his off-premises communications the organizer can speak eloquently about the law's protection of the right to organize but the employees would know that the law subordinates that right to the employer's rights, thereby turning organizing into a subterranean activity. That silent message would go a long way to defeating the right of self-organization created by § 7.

For all these reasons, a rule denying unions seeking to organize workers whose homes are dispersed throughout a large metropolitan area access to the non-work areas on an employer's property open to the public generally—such as the parking lot at issue here—would “severely impair” the ability of unions to communicate with the unorganized and thus would equally impair the employees' right to organize. The NLRB's recognition that this is so can not possibly be faulted.

(4) Contrary to petitioner and its *amici curiae*, this conclusion is not contrary to *Babcock & Wilcox*.

To begin with, it is *not* true, as Lechmere contends, that “*Babcock & Wilcox* instructed the Board to determine only whether union organizers can ‘reach’ employ-

<sup>15</sup> Contrary to Lechmere's contention, we are not arguing—nor does *Jean Country* suggest—that “property rights [should] be compromised because the employees do not react to the message.” Pet. Br. at 23. Whether the employees “react”—*viz.*, whether the union is able to persuade—is irrelevant; what is relevant, is whether the union is relegated to media that can only compromise the union's message.

ees without trespassing.” Pet. Br. at 23. What *Babcock & Wilcox* actually says is quite different: “when the inaccessibility of employees makes *ineffective* the *reasonable* attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield.” 351 U.S. at 112 (emphasis added).

Thus, *Babcock & Wilcox* invites—indeed requires—an inquiry into the “reasonableness” and the “effectiveness” of the alternative means of communications. And, as Judge Selya recognized below, “reasonableness is a concept, not a constant;” the “rights at issue, and the particular, circumstances, color its definition whenever alternative means are examined.” 914 F.2d at 322.

It is, of course, true that in *Babcock & Wilcox* the Court found that there were reasonable alternatives to worksite communications through which the union could effectively communicate its message. But that case is not on all fours with this case. *Babcock & Wilcox* involved very different property (industrial plants which were *not* open to the public), and arose at a very different time (in the mid-1950's when unions were at their zenith), in a very different place (rural communities with populations ranging from 6,000 to 21,000). In that small-town culture of thirty-five years ago, it may well have been possible to identify and communicate with the employees without undue expense, and letters, phone calls, home visits, or conversations on main streets may well have been effective methods of communication.

As *Hudgens v. NLRB*, *supra*, reminds, however, “The responsibility to adapt the Act to changing patterns of industrial life is entrusted in the Board.” 424 U.S. at 523. And the fact that in the *Babcock & Wilcox* context the Court found that “other means” of communication were “readily available,” 351 U.S. at 114, does not require that the Board reach the same conclusion in cases arising in the urban environment and culture of the 1990's.

C. On the other side of the equation are the interests of the employer that are implicated when a union organizer is allowed to enter a parking lot open to the public to communicate with employees before the latter's work day begins or after it ends. In contrast to the substantial adverse impact that denying access would have on § 7 rights, allowing such access works only a "temporary and minor" interference with property.

It is a commonplace—but one that should *not* be lost sight of—that allowing the limited access at issue in this context *does not threaten any management interest of the employer*. Ever since *Republic Aviation Corp. v. Labor Board*, *supra*, it has been settled that employers have an "undisputed right . . . to maintain discipline in their establishments," 324 U.S. at 798.

What is at stake from the employer's standpoint, then, is *not* any legitimate business interest—that interest is recognized by the NLRA itself—but the interest in being allowed to exercise his property rights to refuse union organizers access to non-working areas open to the public.

The phrase "property right," of course, refers not to a unitary right but to a "bundle of rights." *E.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). That being so, when we speak of a *deprivation or impairment* of a property right, we refer not to every action that has some secondary effect on the property but to an action that entails a loss of ownership or possession or a significant restraint on the uses to which the property can be put. *Id.* at 82-85.

Allowing union organizers onto the employer's open property does not work such a deprivation or impairment: the organizer's access does *not* affect the ownership of the property, does *not* interfere with the employer's possession, use or enjoyment of the property, and does *not* diminish the property's value. What the Court said in *PruneYard Shopping Center* is, therefore, very much in point:

Here the requirement that appellants permit appellees to exercise state-protected rights of the free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. [447 U.S. at 83-84.]

Of equal importance here, allowing access in this context does *not* implicate the particular property interest that was at stake in *Babcock & Wilcox*: *the right to control who comes onto an owner's land*. In the class of cases at issue here, in which the property is open to the public (albeit for certain purposes), the union organizer does not commit a trespass by coming on the land. What is objectionable to the employer in this case, as in *Republic Aviation Corp. v. Labor Board*, *supra*, is *not the entry as such but the content of what the organizer says after entering*.

Thus, the only "stick[]" in the bundle of property rights," *PruneYard Shopping Center*, 447 U.S. at 82, that would be adversely affected by permitting the organizer access to discuss organizing would be the employer's right to control an invitee's conduct. And, as *Central Hardware Co. v. NLRB*, *supra*, recognizes, the impairment of that property interest would be "both temporary and minimal." 407 U.S. at 545. Indeed, the only injury to this property interest in this context is that the employer must allow the organizer, once on the property, to engage in a kind of activity which under *Republic Aviation*, the employer must in any event allow on his property.<sup>18</sup>

<sup>18</sup> And under the Board's rulings employers can ordinarily avoid even that intrusion merely by affording the union a listing of the employer's employees. See n.13, p. 21, *supra*.

By any measure, where the organizing union's alternatives for reaching the employees are not reasonable, this is far less an intrusion on the employer's property interests than exclusion would be on the statutory § 7 interests.

D. It bears repeating once more that the "central purpose" of the NLRA is "to protect *and facilitate* employees' opportunity to organize unions." *American Hospital Assn. v. NLRB*, *supra*, 59 L.W. at 4332. (emphasis added). It would be anomalous indeed if a statute enacted for those purposes put so large a burden on the right to organize in order to avoid such a "temporary and minimal" infringement of an element of the employer's bundle of property rights.

#### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. WILLIAM GAGNE  
207 Washington Street  
Hartford, CT 06106-2400

GEORGE R. MURPHY  
PETER J. FORD  
1775 K Street, N.W.  
Washington, D.C. 20006

DAVID SILBERMAN  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390